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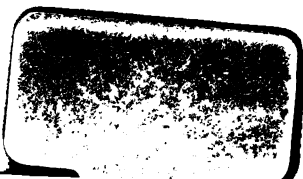
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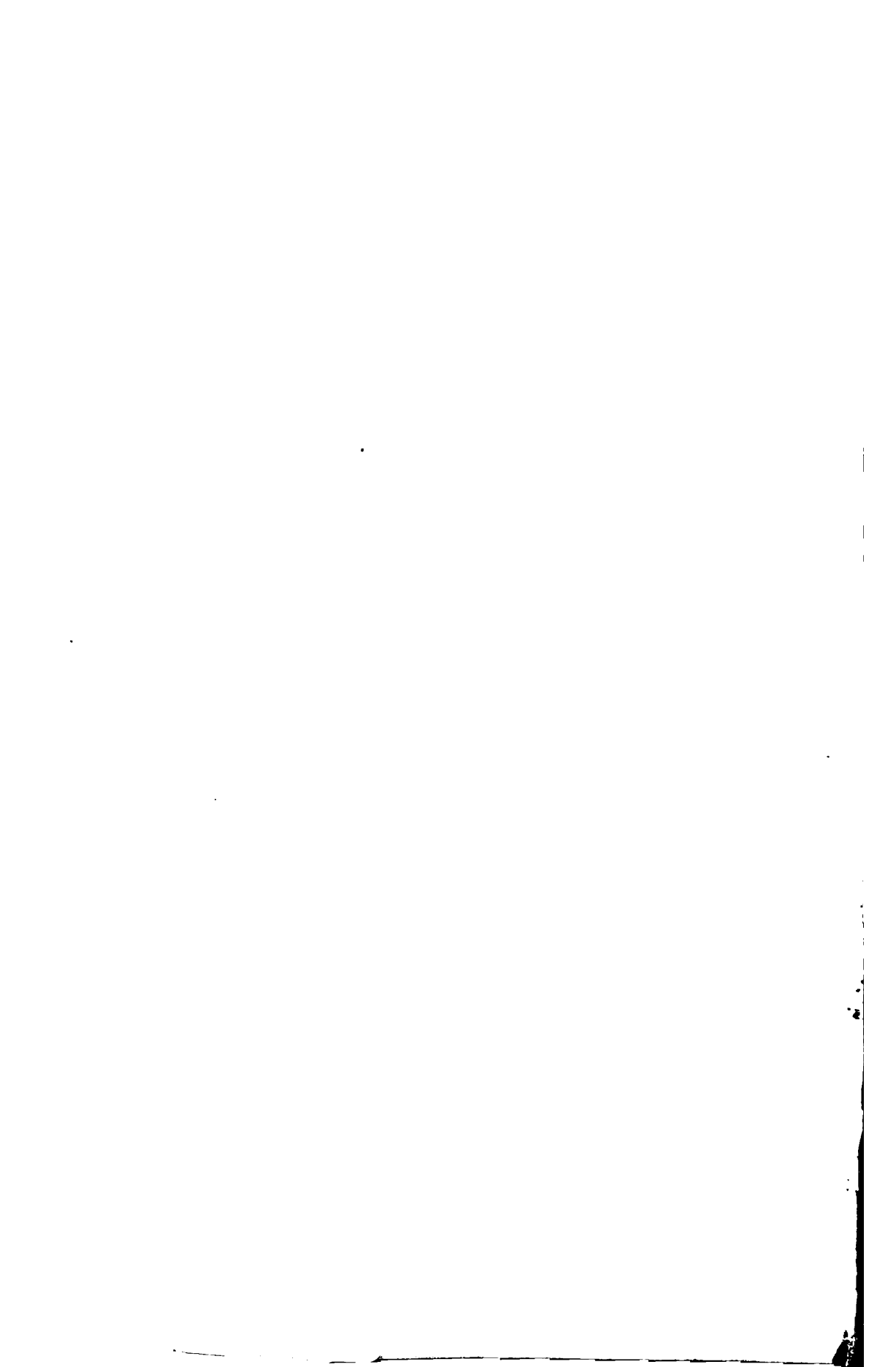
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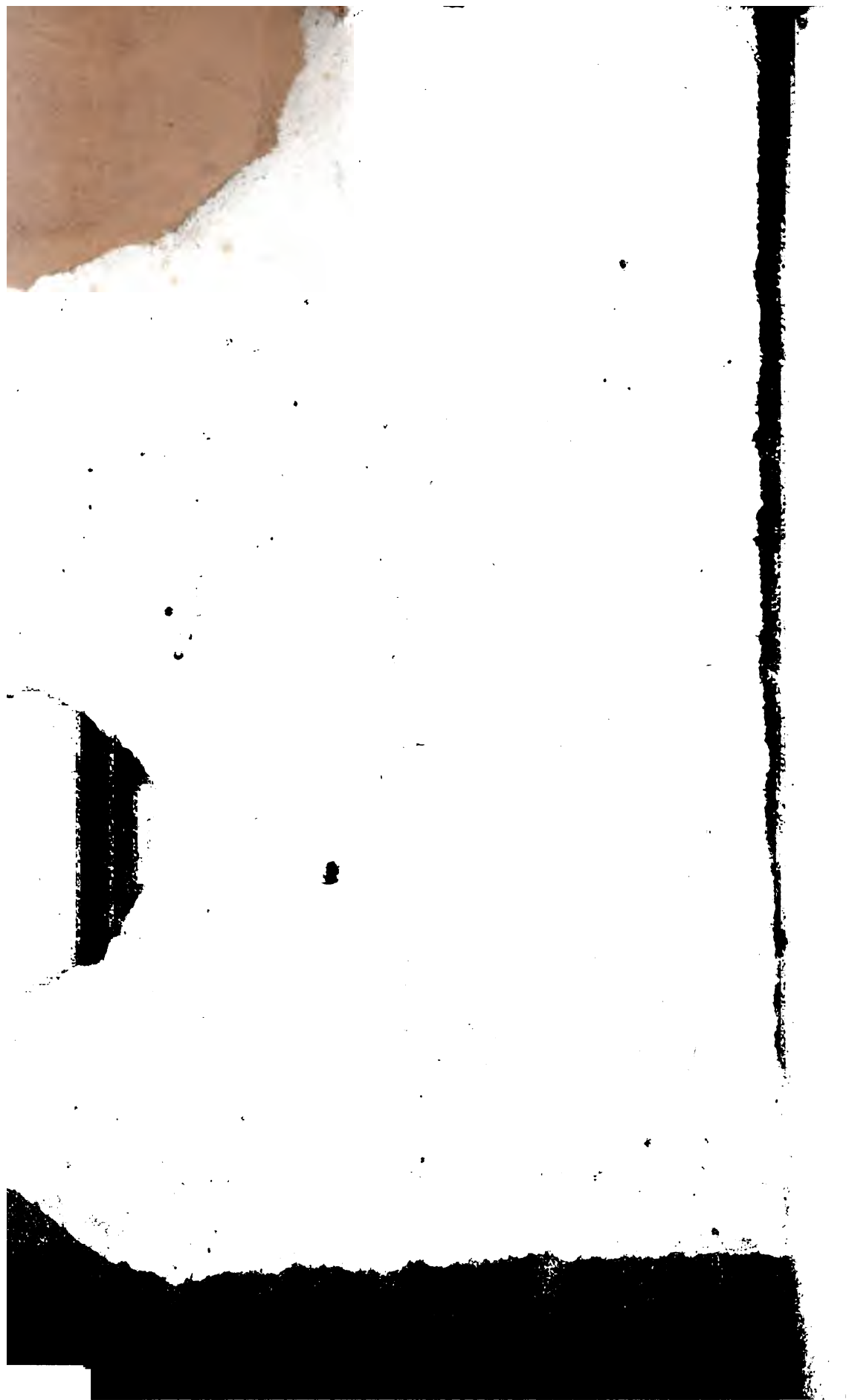
LEASES.

LEASE AND RELEASE.

Vol. II.

L. Eng. C. 19. d.

Conveyancing
87



A
TREATISE
ON
CONVEYANCING;

WITH A VIEW TO ITS

Application to Practice:

BEING A SERIES OF

PRACTICAL OBSERVATIONS,

WRITTEN IN

A PLAIN, FAMILIAR STYLE,

WHICH HAVE FOR THEIR OBJECT

TO ASSIST IN PREPARING DRAUGHTS, AND IN JUDGING OF THE
OPERATION OF DEEDS, BY DISTINGUISHING BETWEEN
THE FORMAL AND ESSENTIAL PARTS OF THOSE
DEEDS, &c. IN GENERAL USE:

BEING

A COURSE OF LECTURES.

WITH AN APPENDIX OF SELECT AND APPROPRIATE
PRECEDENTS.

VOL. II.

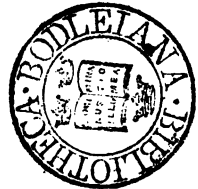
BY RICHARD PRESTON,

Of the Inner Temple, Esq.

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1815.



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TO
SIR SAMUEL ROMILLY, KNIGHT,

ONE OF HIS MAJESTY'S

COUNSEL LEARNED IN THE LAW,

AS

A TESTIMONY

OF THE

AUTHOR'S RESPECT AND ADMIRATION

FOR THOSE

TALENTS WITH WHICH HE IS SO EMINENTLY ENDOWED;

THE

GREAT LEARNING

BY WHICH THEY HAVE BEEN CULTIVATED;

AND FOR

THE INTEGRITY AND INDEPENDENCE

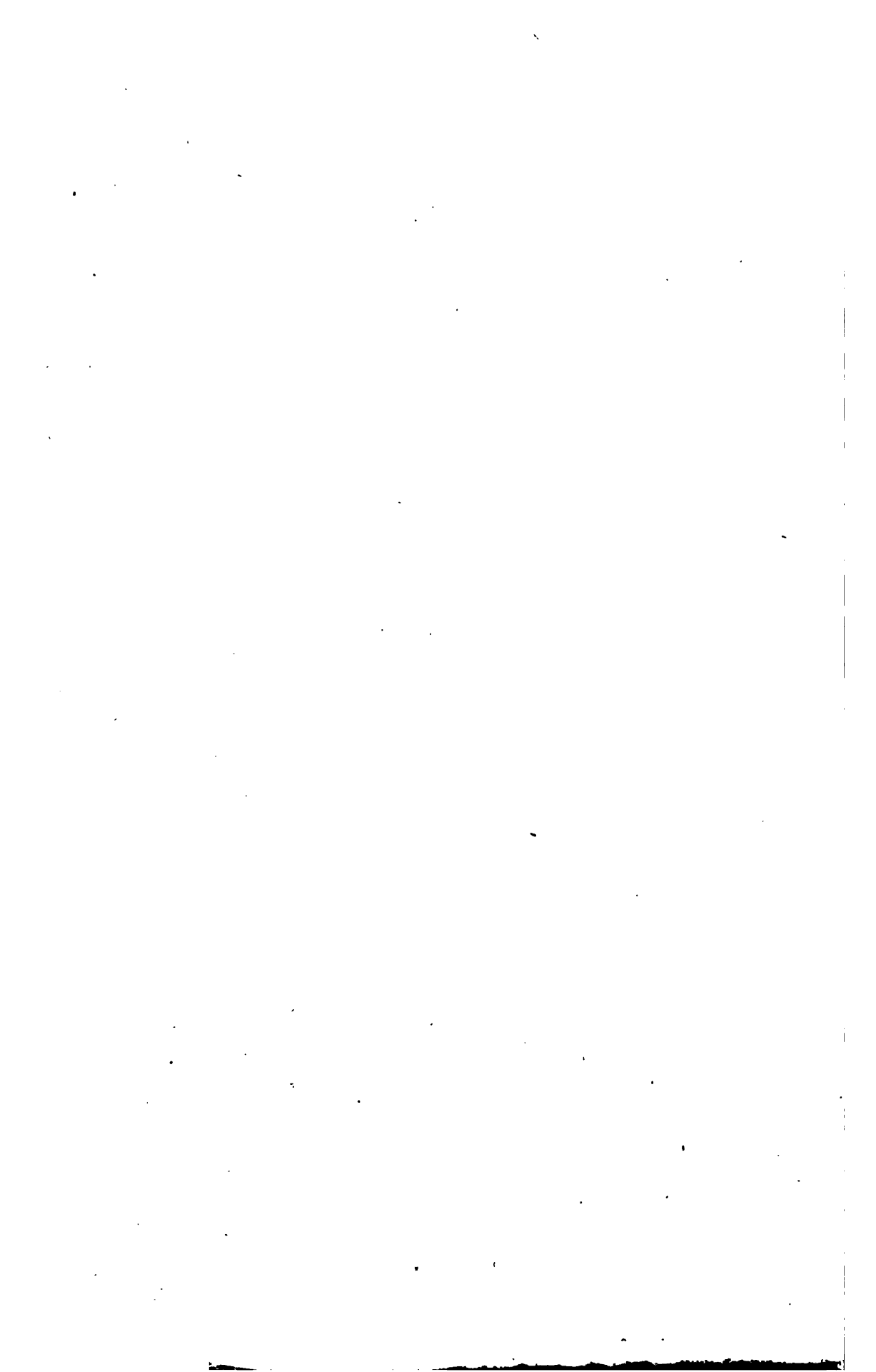
WITH WHICH THEY ARE APPLIED;

THIS VOLUME IS INSCRIBED,

BY HIS VERY FAITHFUL AND

OBEDIENT SERVANT,

THE AUTHOR.



PREFACE

TO THE

SECOND PART OF THIS VOLUME.

To account for the delay in completing the second part of this volume, would be as tedious to the reader as to the author. The reader may be assured, that the delay has given him the advantage of possessing this part of the work in a far more enlarged and perfect state than it would have been if published from the original MSS.

For the Index the profession are in a great measure indebted to John James Park, Esq.; a gentleman who will soon become a competitor for public favour in the line of his pro-

fession : and to William Lee, Esq. I have to acknowledge his kindness, in having devoted a large portion of time, in researches for authorities in support of the propositions advanced in the work. As the work was written without any previous collection of authorities, the completion has been retarded more on that, than on any other, account.

A review of the Table of Contents will give to the reader a general outline and comprehensive view of the various interesting subjects he may expect to find in this volume.

7, *Lincoln's Inn, New Square,*
August, 1815.

THE DEDICATION
 TO THE
 FIRST PART OF THIS VOLUME
 WAS TO
LANCELOT SHADWELL, Esq.
 LATE OF LINCOLN'S INN, NOW DECEASED,
In these Terms.

THE great experience you have had, and the eminence you have deservedly attained, in the conveyancing department of the profession, have made me anxious to place this volume of a work, so intimately connected with the subject of our pursuits, under your protection.

- It was intended that the subjects which will be included in the third volume, should have possessed this advantage.

They had a better claim to this protection, from the circumstance of your having honoured them by a perusal, and kindly suggested some corrections; of which I readily availed myself.

But as the third volume cannot, with convenience, and consistently with other engagements, appear during the present year, I embrace the opportunity which the publication of this volume will afford me, of expressing the high sense I have always entertained of the kindness and liberality I have uniformly experienced in my professional intercourse with you : and of my admiration of the sound and extensive practical information you possess ; the necessary fruits of a long and laborious employment of eminent talents in the study and application of the rules of property ; and in the discharge of the arduous duties of your profession, equally to your honour, and the advantage and satisfaction of the profession at large and the public.

And with great respect,

I am, dear Sir,

Your very faithful and obliged servant,

RICHARD PRESTON.

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continued, has no estate to be enlarged (m). He may release to the disseisor by way of extinguishment of right, but the disseisor cannot release to him with effect. A release would, however, in all probability amount to a renunciation of the disseisin, and do away its effect.

By modern decisions it is established that possibilities coupled with an *interest are devisable* (n). It is also settled that they may be released, *by way of extinguishment of right* (o), or may be bound by way of estoppel (p).

In equity, owners under contingent remainders and executory devises, may bind themselves by *contract for a valuable consideration*. In this sense, and to this extent, these interests are transferrable. But because they are transferrable in equity, it by no means follows that they are grantable at law: on the contrary the decisions in equity suppose and admit, that the conveyance has no *legal operation*. When it is said in some recent decisions that these interests are assignable (q); that expression must, it is submitted, be un-

(m) Shep. T. 319. 322.

(n) Roe v. Jones, 3 Term Rep. 38. 1 Hen. Blackst. 30.

(o) Co. Litt. 214. Shep. T. 238.

(p) Weale v. Lower, Pollex. 54. Buckler's Case, 2 Rep. 55. Moore's Case, Palmer, 365.

(q) Roe v. Jones, 3 Term Rep. 88.

derstood with the restrictions and qualifications expressed in this work. This remark is more necessary, because some gentlemen of the highest eminence have advanced the doctrine, *that possibilities* coupled with an interest are grantable ; these persons considering by *some unaccountable mistake*, that whatever is DEVISABLE, IS GRANTABLE. The rule is only that whatever is grantable is devisable : and some interests which are devisable are not grantable ; for example, the interest under Contingent Remainders and Executory Devises.

As connected with this subject, it may be observed that contingent interests to the *survivor* of several persons (*r*) ; or to persons who shall answer a given description, and who are not yet ascertained, as the children of A. *who shall be living at his death* ; or the expectancy of an heir, though they are possibilities coupled with an interest, are not, it is apprehended, *devisable*, (*s*) or even releasable : and in a late case (*t*) of great anxiety, and very fully considered, it was decided in the court of King's Bench, that a right or *title of entry, or of action*, though an interest which is *releasable*, is not devisable.

(*r*) 1 Fearn, 541.

(*s*) Doe v. Tomkinson, 1 Maule and Selwyn 165. cited *infra*.

(*t*) Goodright v. Forrester, 8 East, 552.

On this judgment there was a writ of error brought in the Exchequer Chamber, and this point was full argued and discussed; but the decision of that court was founded on another point—the bar by non-claim on a fine with proclamations: The Ch. Justice of the Common Pleas who delivered the judgment of the Court of Exchequer Chamber, distinctly and repeatedly declared, that there was not any intention in that court of questioning the judgment in the King's Bench (*u*).

That expectancies may be bound by estoppel, is the consequence of a rule of law, concerning titles, and not of any present interest in the parties. Equity holds the contract of an expectant heir who becomes heir *de facto*, binding on him: but this equity is deemed personal to the party, and does not extend to his heir (*v*).

It is immaterial whether the releasor has *an estate in possession* (*w*), *reversion*, or *remainder* (*x*); or whether he is a *joint-tenant*, or *tenant in common*, or a *coparcener*, or even seized by *entireties*. The release may operate under all these circumstances. It may also operate whether it proceeds from a

(*u*) This is stated from the author's knowledge of the fact.

(*v*) *Clayton v. Duke of Newcastle*, 2 Ch. Ca. 112. *Morse, v. Faulkener and others*, Anstr. 11.

(*w*) Co. Litt. 265. a.

(*x*) *Shep. T.* 321.

person seised of an estate in *fee simple*, *fee tail*, or *for life*. All that is requisite is, that there should be in the releasor an estate of *freehold* or *inheritance*. The statute of uses(*x*) applies to estates of those persons alone, who are *seised*; and it follows that the bargain and sale, as part of the assurance by lease and release, must proceed from a person who has an estate of inheritance, or at least an estate of freehold. The use declared of the estate of a *termor* for years (*y*) or of the estate of the owner of any other chattel interest, cannot be executed into estate by the statute.

The releasor must also be a person, who in point of estate, may stand seised to an use. Instances have already been enumerated of the king, a corporation, &c. in which the use cannot arise by reason of some circumstances peculiar to the grantor; and it has already been noticed that a tenant *in tail* may, under certain modifications, stand seised to an use. The observations on that point prove that a lease and release by a tenant in tail, will be an efficient conveyance to pass his estate (*z*). Such conveyance, however,

(*x*) 27 Hen. 8.

(*y*) 1 Dyer, 369. a. pl. 50.

(*z*) Seymour's Case, 10 Rep. Machel v. Clerk, 2 Lord Raym. Doe v. Whitehead, 3 Burr. Stapylton v. Stapylton, 1 Atk. 2.

will be defeasible by the issue in tail, the remainder-men or reversioner, unless the proper ceremonies for barring the interest of these persons shall be observed.

Fourthly, Who may be the releasee.

1st, In respect of personal qualification.

2d, In respect of estate.

First. Any person capable of a grant may be the grantee in the lease, and also in the release.

Secondly. The principal point to be regarded is, that, either in fact or in intendment of law, the releasee should, prior to the execution of the release, have acquired an estate vested, either in possession, or in reversion, or remainder (*a*) to be capable of enlargement. The lease for a year is, in modern practice, made with the intention, and, in skilful hands, with the declared object, of creating an estate, which may admit of enlargement; and it is to be called to mind that the grantee must have an actual term or estate, and not merely an *interesse termini*, or a right of entry, or an executory interest (*b*). And it is to be remembered, that under the rules of the common law, a lessee has not any estate till entry on lands held for an estate in possession; nor before the statute for the amendment

(*a*) Litt. s. 459. Co. Litt. 270.

(*b*) Litt. s. 459. Co. Litt. 46. b. 270. a.

of the law had he any estate, till attornment, when the lands were held for an estate in reversion or remainder. Immediately after opening the learning, in the next division, a more detailed view will be taken of the rules which concern this part of the assurance.

But a *seisin* in law will suffice to suppose a release, in enlargement of the estate ; as is the case of a release to a tenant for life in remainder, during the continuance of a prior particular estate, or after the determination thereof, and before *entry*.

A few observations will now be proper, respecting the tenant whose *estate*, or interest, is capable of being enlarged by release.

A person who has the fee, (c) has the utmost extent or degree of interest of which a man is capable : in the language of Littleton, (d) “ a man cannot have a more large “ or greater estate of inheritance than fee- “ simple.” His estate does not admit of any increase. It may be determinable, or defeasible ; and these qualities may cease, or they may be discharged by a release (e). Such release operates by way of *extinguishment* of right or title (f), and not as a release in enlargement of a prior estate.

(c) Essay on the Quantity of Estates, Chap. Fee.

(d) Litt. s. 11.

(e) Essay on the Quantity of Estates, Chap. Fee.

(f) Shep. Abr. Chap. Extinguishment.

When an instrument operates as a release by way of enlargement, it transfers an estate. It passes a seisin: in short, it is a conveyance. From these deductions it follows that uses may be, and they are continually declared of theseisin, transferred by this assurance. *No use* can be declared on a release of right, or of title, or of a possibility: and of this nature is a release of the determinable or defeasible quality of an estate in fee. There is one species of fee which it should seem admits of enlargement. This is the particular and peculiar case of an estate-tail, or a fee converted from an intail, into a base or determinable fee (*g*). In this instance, the base or determinable fee may be in one person, and an actual estate may be in another person. Consistently with principle, a base fee, being a particular estate, may be enlarged, by the accession of the remainder or reversion in fee, conferring the ulterior interest: for there is an estate to be added, and that estate is, in legal denomination, and in legal intendment, larger than this base or determinable fee. This instance forms an exception to the general rule, that one fee cannot be dependant, or expectant, on another fee (*h*). The rule is true, only when

(*g*) Co. Litt. 18. a. *Machell v. Clarke*, 2 Lord Raym. 778.

(*h*) Co. Litt. 18. a. *Essay on Estates*, Chap. Fee.

understood with the qualification, that one fee, cannot, *by the grant* of the party, be expectant on another fee, not being a particular estate; and no fee, except a fee-tail, or a base fee arising from an estate-tail, is considered as a particular estate.

The conversion of an estate-tail into a base fee, is merely a consequence of law, and the necessary result of the statute *de donis* (i), which made the conditional fee, of antient times, the estate-tail; a particular estate, of modern times. When a man grants an estate to another and his heirs, determinable in any manner, he retains merely a *possibility of reverter*. This possibility may be released to the person who has the determinable fee : but notwithstanding Mr. Fearne's (j) ingenious reasoning to establish a contrary doctrine, the more correct opinion, drawn from the principles of tenure, seems to be that this possibility does not admit of being granted. On the other hand, an actual reversion or remainder may exist as an *estate* after the creation of an estate-tail ; and this reversion or remainder, though it becomes expectant on a base fee, as the ownership arising from an estate-tail, after its descendible quality has

(i) 13 Edw. 1. c. 1.

(j) 1 Fearne's Contingent Rem. Butler's Edit. p. 359.
Stat. de Donis, 13 Edw. 1. c. 1. Co. Litt. 18. a.

been changed from the issue in tail to the common law heir, confers an interest which may be granted from one person to another. For that reason, it may be released to the person who has the base or determinable fee, in enlargement of his estate. Hence also the decision that a base fee acquired from the alteration in the descendible quality of an estate-tail, may merge in the ultimate remainder or reversion in fee (*k*). No doubt is entertained that an instrument in the form of a lease and release would operate by way of release of the possibility, when there is merely a possibility of reverter. The case is noticed only for the sake of a distinction, and to illustrate the general principles on which the assurance by lease and release depends.

Let it also be remembered that when a tenant in tail discontinues (*l*), or a tenant for life aliens tortiously, and thereby divests the reversion or remainder (*m*), the reversion or remainder is converted, in the former instance into a right of action; and in the latter instance into a right of entry: and such right of entry may eventually by the

(*k*) *Symonds v. Cudmore*, 4 Mod. 1.

Kinaston v. Clarke, 2 Atk. 204.

Shelburn v. Biddulph, 6 Bro. Parl. Cas. 53. Edit. 1803.

(*l*) Litt. Section 592, and the commentary.

(*m*) *Bredon's Case*, 1 Rep. 76.

Goodright ex dem. Burton v. Forrester, 1 Taunton, 578.

statute of limitations, or by a descent which tolls the entry, become a mere right of action (*n*). In each of the instances, the right or title of entry or of action, may be released by way of extinguishment. In neither case can it be released by way of enlargement of estate ; since the remainder or reversioner does not retain any estate. He has merely a right of action or of entry, to restore or revive his estate. This subject, with the principles by which it is governed, will be found in the arguments, in the case of *Goodright on the demise of Burton v. Forester*, in the Court of Exchequer Chamber (*o*), and the chapter on alienation by tenant in tail in the tracts on cross remainders, &c.

To guard the reader against an error into which these observations and first principles might easily lead him, he ought to be apprized, that it is decided by two cases (*p*), and was expressed to be the opinion of Lord *Alvanley* in another case (*q*), that if a person become seised in fee, subject to an executory devise to take place on an event which happens ; and before the event happens,

(*n*) Tracts on Cross Remainders in Chap. on Alienation by Tenant in Tail.

(*o*) 1 Taunt. 578.

(*p*) *Goodright v. Searle*, 2 Wilson, 29.

Goodtitle v. White, 2 New Rep. 383.

(*q*) 3 Bos. and Pull. 655.

the interest under this executory devise, descends to him, and afterwards he dies intestate, leaving two classes of heirs : one to the seisin which he had ; the other to the interest which he derived under the possibility ; the heir to the possibility, and not the heir to the seisin, shall be preferred. These decisions of course deny that the possibility was extinguished in the estate ; for if the possibility had been extinguished, it could not have governed the descent. With every respect the author feels for the decisions of the courts, he considered these cases as anomalous.

With this impression, and the opinion of those most conversant with the subject, including Mr. *Watkins*, who in his *Treatise on Descents* (r) had adopted the proposition from *Goodright v. Searle*, and whose name can never be mentioned with too much respect, either for talent, learning, industry, or liberality ; this point was again brought under discussion in the case of *Goodtitle*, lessee of *Elizabeth Vincent v. White* (s), and the decision of the Court of King's Bench was founded on the former determinations in *Goodright and Searle*, and *Goodtitle dem. Vincent v. White* (t). Still,

(r) *Watkins on Descents*, c. 3, s. 2. 155.

(s) 15 East. 174.

(t) 2 New Rep. 383.

however, it was determined to appeal from the judgment of the Court of King's Bench to the Court of Exchequer Chamber. The decision in the latter court will be considered conclusive between these parties, since the property will not bear the expence of further litigation. For the sake of principle rather than of the precedent afforded by *Goodright* and *Searle* ; a precedent which if an opinion may be formed from the report, arose from a confusion of the doctrine of extinguishment with the doctrine of Merger ; it is to be hoped that the Court of *Exchequer Chamber*, guarding against the mischief of anomalies, on a subject of so much importance, and of such frequent occurrence as the law of descents, will bring back the law to the point on which all the former cases seem to have received their decision ; namely, that the same person cannot have the estate and the condition, the estate and the title, the land and the rent, the land and the common ; nor, consequently, the estate, and the possibility by which the estate is to be defeated : and it is material that the *Chief Justice* of the King's Bench admitted that it was a matter of indifference in what way the law had been *originally* decided, in *Goodright v. Searle*, which he considered as having settled this point.

It is to be lamented that the point of title had not arisen on the effect of a will

by a person, who had at one and the same time, the estate and the possibility, under a gift to him as the survivor of several persons, and who made his will before he became the survivor. It may reasonably be expected that the judges would support the will against each class of heirs; and it would be difficult to understand on what ground, if the late decision be right, they could support the will against the heirs claiming under the possibility, as distinct from the estate^(u); since a fee to vest in the survivor of several persons is not, while in contingency, ~~considered to be~~, indeed is now decided not to be, a devisable interest. The law has in no case ever treated an estate, and the right to an estate, as two distinct interests in one and the same person, at one and the same time, except for an instant, when the law, by its own operation, does, under the learning of *remitter*, substitute the right in the place of the estate; and treat the party as seised by force of his rightful interest, and not by force of the estate acquired by wrong.

If it should be alledged that these limitations in *Goodright v. Searle*, and in the cases of *Doe v. White*, were by executory devise, and that executory devises have introduced a new species of interest, by

(u) *Doe v. Tomkinson*, 2 Maule and Selwyn, 165.

way of remainder, though these interests are not remainders in the strict sense of the term ; the answer seems to be, that the different interests have qualities well known to the rules of the common law ; and that the rules of the common law are equally applicable to interests created by executory devise, as if they had been created by any other mode, or had resulted from any other rule or consequence of law. It was the wisdom and part of the plan, of those who introduced and encouraged the law of executory devises, to assimilate the interest by executory devise, to corresponding interests arising by any other means. Thus possibilities under executory devises were releasable in the same manner as all other possibilities were releasable : and as they were releasable by the act of the parties (a), it is difficult to comprehend for what reason they should not, like all other possibilities, be releasable by act of law ; by union, and consolidation with the estate to which they formed a collateral interest, and to which they gave a collateral or determinable quality. In short, it is impossible to pursue the learning and the principles on which the law of *merger*, the law of *extinguishment*, and the law of *remitter* are seve-

(a) Lampell's Case, 10 Rep. 46.

Matthew Manning's Case, 8 Rep. 94.

rally grounded ; and not to feel that the case of *Goodright* and *Searle* is one of those unfortunate decisions which trench on first principles, and break down one of those barriers by which consistency of principle, decision, and opinion are secured ; and that it leads to doubts on many points, which without such a decision could never have been questioned with any semblance of reason.

While on this subject, it may be worth attention to notice the case of a gift, attended with these circumstances :—

A person being seised in fee by descent under an estate-tail, to his father and mother, suffered a common recovery, and acquired the fee: he was therefore seised of the fee in the course of *descent* from his father and mother. It is not, as far as the fact can be traced, decided by any book, whether the course of descent was to be from the mother, who was the surviving parent, or first from the father, and secondly from the mother. On the principles of equity from which we derive the descendible qualities of the use or estate, it should seem, that the heir of the father in the first place, and afterwards the heir of the mother, would be admitted into the succession ; but a title attended with these circumstances cannot be safely accepted until it shall have undergone the ordeal of judicial decision.

To resume the subject from which there has been a digression.

1st, Every particular vested estate is capable of enlargement. Therefore the estate of tenant for years (c), for life, and either for his own life or *pur autre vie* (d), or *in tail* (e), and either in his own right, or in the right of his wife (f), or even, it is apprehended, of a testator; and even the estate of a tenant at will (g), or of a copyholder (h), or, according to the better opinion, of a *cestui que trust*, holding at the will of the trustees (i), or of a mortgagor holding at the will of the mortgagee, of tenant by *statute merchant*, *elegit*, or the like (k), may be enlarged by release. But tenant *at sufferance* has no estate, nor is there any privity remaining; and as a consequence, he is not capable of a release to operate in enlargement of an estate (l). In short, a person who merely has the possession, or holds by sufferance, is inaccurately denominated a tenant. *Tenants* in dower and by curtesy, being those husbands and wives who have actual es-

(c) Litt. s. 459, 465.

(d) Co. Litt. 273. b.

(e) Shep. Touch. 323.

(f) Co. Litt. 273. b. 299. a.

(g) Litt. 460.

(h) Watkins's Copy. 36. a.

(i) Ib. 462, 463. and the commentary.

(k) Co. Litt. 270. b. 273. b. Shep. Touchst. 322.

(l) Co. Litt. 271. Butler v. Duckmanton, Cro. Jac. 169.

Note.—The authorities which are cited, merely afford a principle, and are not directly in point.

tates, are capable of such release. They have a notoriety of possession, and privity of estate with the releasor. Each of these tenants has an estate of freehold. It is at the same time observable, that before the title of dower is perfected by execution or endowment, the dowress has not any estate (*m*), she has merely a title of dower. That title may, by way of extinguishment, be released by the dowress; but while she has any interest short of an estate, she is not, in respect of such interest, capable of a release: nor can she convey by lease and release till she becomes tenant. In other words, till she has an estate in dower: she may release her right or title of dower to the terre-tenant, and such release operates by way of extinguishment, and not of conveyance, and a lease and release may operate in this mode. Tenant by the curtesy has an estate immediately on the death of his wife, without any further ceremony, provided the seisin of his wife continued in him and his wife in her right till her death (*n*). It is also agreed that a release to a tenant in tail may operate by way of enlargement (*o*), or more accurately speaking, by way of accession of estate.

(*m*) Gilbert on Tenures, 26. *Roe v. Power*, New Rep. 1. And that there must be an estate upon which the release is founded, see Co. Litt. 273. a.

(*n*) Litt. s. 394. and the Commentary.

(*o*) 2 Roll. Abr. 400. *Shep. Touch.* 322.

The effect of a release is in most cases to occasion a merger of the particular estate to be enlarged, when the estate to be enlarged, and the estate granted by way of enlargement, are immediate to each other. But the grant to a tenant in tail of an immediate estate, will not operate to enlarge the estate-tail as against the issue. This proves that it is not a necessary circumstance to the operation of a release, that it should occasion the absolute merger of the particular estate intended to be enlarged, or the union or consolidation of the two interests.

Notwithstanding the acceptance of the release, the estate-tail will in point of right, and perhaps, indeed probably, in point of estate, remain a distinct interest, on the same principle that an estate-tail will remain a distinct interest, so long as the heirs in tail are within the protection of the statute *de donis*, although the tenant in tail acquires the fee by the original grant, or by subsequent purchase or descent (*p*). From subsequent observations it will also be collected, that there are *other instances* in which the release may have full effect, without causing the *merger* of the particular estate intended to be enlarged. These cases more fully prove that the release is, in point of

(*p*) *Wiscot's Case*, 2 Rep. Symonds v. Cudmore, 4 Mod. L.

law, no more than a grant to a person, having a particular estate; and that it takes its denomination from the connection and privity between the parties to the conveyance, rather than from any peculiar operation.

Littleton's reasoning, as applied to a release to a tenant for years, or at will, pervades the whole series of cases; and ought to have been introduced into the division which shews the origin and foundation of this assurance.

The material sections of *Littleton* are in these terms:—

Litt. s. 459. “Also if a man letteth to
 “another his land (*q*) for term of years, if
 “the lessor release to the lessee all his
 “right, &c. before that the lessee *had*
 “entered into the same land by force of the
 “same lease, such release is void, for that
 “the lessee had not possession (*r*) in the
 “land at the time of the release made, but
 “only a right to have the same land by
 “force of the lease; but if the lessee *enter*
 “into the land and hath possession of it (*s*),
 “by force of the said lease, then such release
 “made to him by the feoffor (*t*), or by his

(*q*) Being in possession must be understood.

(*r*) A vested estate.

(*s*) And consequently an estate.

(*t*) Should be by the lessor.

“ heir, is sufficient to him by reason of the
 “ privitie, which by force of the lease is
 “ between them, &c.”

Sec. 460. “ In the same manner it is,
 “ as it seemeth where a lease is made to a
 “ man to hold of the lessor at his will, by
 “ force of which lease the lessee hath pos-
 “ session: if the lessor, in this case make a
 “ release to the lessee of all his right, &c.
 “ this release is good enough for the privity
 “ which is between them; for it shall *be in*
 “ *vain to make an estate by a livery of seisin*
 “ to another, where he hath possession of
 “ the same land by the *lease of the same*
 “ man before, &c.”

Sec. 461. “ But where a man of his own
 “ head occupieth lands or tenements (*u*),
 “ at the will of him which hath the free-
 “ hold, and such occupier claiming nothing
 “ but at will, &c. if he which hath the free-
 “ hold will release all his right to the occu-
 “ pier, &c. this release is void, because
 “ there is no privitie between them by
 “ *the(v)* lease made to the occupier, nor by
 “ other manner, &c.” (*w*)

(*u*) Claiming to hold the same.

(*v*) Read “*a*.”

(*w*) This doctrine is correct in principle, but questionable in its application to the fact: for why may not a man claiming to be tenant at will become tenant at will by the admission of the Owner, and his consent to treat him as tenant? And why is not the release to the occupier evidence of an admission that he holdeth at will? Besides, if the occupier doth not hold as

An estate for life is also capable of enlargement. In short, every particular estate, conferring the necessary circumstance of privity, may be enlarged by release. Thus an estate after *possibility of issue* extinct ; an estate for years (x) ; and even at will (y), may be enlarged by release ; and it is agreed that the estate of a *copyholder* (z) who holds at the will of the lord, according to the custom of the manor, is an interest which admits of enlargement, by release from the lord. The release converts the copyhold interest into a freehold tenure.

Littleton (a) propounds the question whether a *cestui que trust*, who holds by the permission of the trustee, and who is a *quasi* tenant at will only, and not a tenant at will, is capable of receiving a release by way of enlargement. Between these parties there is not any privity, no tenancy. In case there was a tenancy, a distress might be taken by the trustee on the *cestui que trust* ; but no distress can be maintained unless there be a tenancy by express con-

tenant, he must in construction of law be viewed as disseisor, and as disseisor he is capable of a release in extinguishment of the right. Co. Litt. 271. See also the case, cited *infra*, from Mr. Wightwick's Reports.

(x) Litt. 459, 465.

(y) Litt. 460.

(z) Watkins's Copyhold, 367. and observation, *supra*.

(a) Litt. 462, 463.

tract between the parties.. The sections of Littleton are in the following words :

Sec. 462. " Also if a man enfeoff other
" men of his land, upon confidence and to
" the intent to perform his last will, and
" the feoffor occupieth the same land at the
" will of his feoffees, and after the feoffees
" release by their deed to their feoffor, all
" their right, &c. this hath been a question,
" if such release be good or no. And some
" have said that such release is void, because
" there was no privitie betweene the feof-
" fees and their feoffor, insomuch as no
" lease was made after such feoffment by
" the feoffees to the feoffor to hold at their
" will, and some have said the contrarie,
" and that for two causes."

Sec. 463. " One is, that when such
" feoffment is made upon confidence to
" perform the will of the feoffor, it shall be
" intended by the law that the feoffor
" ought presently to occupy the land at the
" will of his feoffees, and so there is the
" like kind of privitie betweene them as
" if a man make a feoffment to others, and
" they immediately upon the feoffment,
" will and grant that their feoffor shall
" occupy the land at their will, &c."

Sec. 464. " Another cause they alledge
" that if such land bee worth fortie shillings
" a yeare, &c. then such feoffor shall be
" sworn in assize and other inquests in plea

“ reals, and also in plees personals, or
“ what great sum soever the plaintiff will
“ declare, &c. and this is by the common law
“ of the land. Ergo, this is for a great cause,
“ and the cause is for that the law will, that
“ such feoffors and their heirs ought to
“ occupie, &c. and to take and enjoy all
“ manner of profits, issues, and revenues,
“ &c. as if the lands were their own, with-
“ out interruption of the feoffees, notwith-
“ standing such feoffment. *Ergo*, the same
“ law giveth a privitie between such feof-
“ fers and the feoffees upon confidences,
“ &c. for which causes they have said that
“ such releases made by such feoffees upon
“ confidence to their feoffor or to his heirs,
“ &c. so occupying the lands, shall be good
“ enough, and this is the better opinion as
“ it seemeth.”

And on these sections, *Lord Coke* ob-
serves (b) : “ Here is a question moved, and
“ the reasons of both sides shewed, and as
“ it hath been observed, the latter opinion
“ is the better, being *Littleton's* own
“ opinion.”

And the case of the trustee and *cestui que*
trust, and the case of a *mortgagor* and *mort-*
gagee, may, with great propriety, be re-
ferred to the same principles. The law on

(b) 271, b.

this point will frequently obviate the objection that there is not any evidence of a lease for a year, as part of a reconveyance by a mortgagee to the mortgagor ; or by a trustee to his *cestui que trust*, when the mortgagor or *cestui que trust* has the possession of the land. And a recital of the fact of possession will suffice ; and by parity of reasoning, the proof of the fact would be equivalent to a recital (c).

It has been doubted whether the estate of tenant by statute merchant, statute staple, and elegit, admits of enlargement by release.

In Roll's Abridgment (d), there are the following passages :

“ If a man has execution of land upon
“ an elegit, it seems that he in reversion
“ for whose debt it is extended, cannot
“ enlarge his estate by a confirmation to
“ him. To hold for life for want of privity,
“ between them for the tenant by elegit
“ comes in by act in law. Contra 31 Ass.
“ 13. admitted.”

“ So he cannot enlarge his estate by
“ release, to hold for life for want of privity,
“ contra 31 Ass. 13. admitted.”

“ If a man sue execution upon an elegit
“ of my land ; and after I, who have the re-
“ version in fee, confirm to him his estate,

(c) ——— v. ———, Wightwick.

(d) 2 Roll. Abr. 401.

“ he may after enlarge his estate by release
“ to hold in fee, for the confirmation has
“ created a privity between them. 31 Ass.
“ 13. admitted.”

And in Mr. Sanders’s valuable Treatise on Uses and Trusts^(e), we find this passage.

“ A release of this kind, (that is, a re-
“ lease enlarging an estate,) will not operate
“ upon the possession of an under-lessee,
“ or of a tenant at sufferance, by *elegit* or
“ statute merchant.”

And these passages seem to justify the opinion that the estate of a tenant by statute, &c. is not capable of enlargement, except a privity has been created, by means of a confirmation to the tenant, of his interest under the extent. The passage in the book of *Assizes*, to which reference is made, certainly warrants the opinion, that the estate under the *elegit* was merged or extinguished, or rather enlarged by the release.

The case in the book of *Assize* is long and complicated. Its substance and effect, however, are very neatly and correctly summed up by *Brooke*, in the following terms :

“ Where there is a tenant by *elegit*, and
“ the tenant of the freehold charges the
“ lands with a rent, after execution had by

^(e) 2 Vol. p. 59. Edit. 1813.

“ extent, and afterwards the tenant of the
“ freehold confirms the estate of tenant by
“ *elegit*, for term of his life, *or releases* to
“ him all his right, now the tenant shall
“ hold charged, where he held discharged
“ before ; for now he is in, of the estate
“ of freehold, where he had but a chattel
“ before ; and so in of another estate, and
“ in by the tenant of the freehold, who
“ charged where he was in by the law (a)
“ before.”

And it is observable that unless this release operated by way of enlargement, the release, as such, could not have been good, because the freehold could not have passed without livery of seisin, or without attornment. The grant was good only because it was made to the person who had the possession by force of the execution upon the *elegit*.

Nor is it against the authority of the passage in *Brooke* which has been cited, that *Brooke*, under the head Charge (b), and “extinguishment (c),” refers the decision to confirmation, for such confirmation must have operated by way of enlargement, and a confirmation in enlargement is referable to the same rules of law as a release in enlargement.

(a) Viz. under the *elegit*.

(b) Bro. Charge, 29.

(c) Bro. Extinguishment, 30.

The commentary of *Lord Coke* (d), is sometimes cited to support the opinion that the estate of these tenants by statute merchant, &c. &c. does not admit of enlargement. So far, however, from *Lord Coke's* sanctioning this deduction, there is an express admission by him that the estate of these tenants may be enlarged. In one passage his Lordship (e) observes : " So it
" is if a release be made to tenant by sta-
" tute staple, or merchant, or tenant by
" elegit, as hath been said, and so likewise
" to guardians in chivalrie, which holdeth
" in for the value by him in the reversion
" of all his right in the land : by this
" a freehold passeth for the life of him, to
" whom the release is made, for that is the
" greatest estate that can pass without apt
" words of inheritance."

In another passage (f), *Lord Coke* virtually admits that the *estate* of tenants by statute merchant, &c. may be enlarged when it is completely executed, though it cannot be enlarged while it remains like an *interesse termini*, in an executory and imperfect state ; and *Sheppard* in his *Touchstone* (g), assumes it as a clear proposition, that estates of this description, are, like

(d) Co. Litt. 315. b.

(e) Ib. 273. b.

(f) Co. Litt. 270. b.

(g) Shep. Touch. 321.

other vested interests, capable of enlargement. The passage in the Touchstone is in these terms :—" The releasee must be "*lessee* for life, years, or tenant by statute " merchant, staple, or elegit, or as guardian " in chivalry, that doth hold over for the " value or at least must be tenant at will."

Indeed it would be singular if the estate of tenant by statute merchant, &c. might not be enlarged by release. The estate confers a vested interest. It changes the relative situation of the debtor, or other person against whom the execution is levied. Instead of having an estate which confers a right to the possession, to be aliened by feoffment, or other act proper to transfer a seisin, coupled with the possession, the reversioner has an estate or interest lying in grant, of which no alienation could be made at the common law to a stranger without a deed of grant, and the attornment of the particular tenant. What impediment then is there, in point of law or in principle, to the right of a tenant by statute merchant to receive such grant, without the ceremony of attornment, since his acceptance supplies the place of that ceremony? It would be difficult to find any legal objection against the validity of such grant, even were attornment necessary at this day in the same manner as it was formerly. However, it

is admitted that the case stands on the same ground, and must be decided by the same principles now, when the necessity of attornment is superseded, as it must have been decided at the common law, when attornment was essential to the validity of a grant to a stranger, by the owner of a reversionary estate. To support the proposition that a tenant by elegit, or statute merchant, is not capable of a release, to operate by enlargement, it is said (*h*), that to make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in the actual possession of, or should have a vested interest in the lands intended to be released; that there should be a privity between him and the releasor, and that the possession of the releasee should be notorious. It is difficult to understand how it can be made out in point of fact or of law, that any one of these qualifications is wanting in a tenant by statute or elegit. No one controverts his right to a vested interest after an execution has been sued, and the possession delivered by the sheriff, and the writ of execution has been returned. That there is also privity of estate, may be inferred from the acknowledged doctrine that a forfeiture may be incurred by the tenant

(*h*) Co. Litt. 273. note 1.

of this estate by making a feoffment, levying a fine, &c. (i) and that a surrender by the tenant by statute merchant, &c. to the reversioner will be available (k). And Lord Coke has admitted (l), that if a man extend land by force of a statute merchant, staple, recognizance, or elegit, he leaveth a *reversion* in the conuzor.

A case in *Rolle* (m), also admits that the estate of this tenant may be confirmed, and after confirmation there may be enlargement. To admit that the estate of tenant by statute merchant, &c. may be confirmed, is, in principle, to admit that it may be enlarged by release; for releases by way of enlargement, and such confirmations, depend upon the same principles of tenure. But it may be objected that this is true only as applied to releases and confirmations, when the object of such assurance is to enlarge an estate, and that a confirmation of *title*, differs from a confirmation by way of enlargement of estate. The objection depends upon a refined distinction. Even though confirmation of title were essential, (a point which, however, is not conceded,) it would be more consonant with that liberality, or rather to that just applica-

(i) Moor, 663.

(k) Corbet's Case, 4 Rep. 82. b. 2 Vent. 326.

(l) Co. Lit. 250. b. 315. b.

(m) 2 Roll's Abr. 401. pl. 14.

tion of principle, which ought to govern the decisions of courts of justice, and even to the authorities with which the books abound, that the release, rather than fail of effect should have the twofold operation, first, of a confirmation; and secondly, of a release. It remains only to shew that there is no want of notoriety: Why is not an entry by virtue of an execution, as notorious, as an entry by virtue of a lease? After the demandant in a real action, has obtained seisin under an execution, the tenant in the action, or a stranger may release to him. The validity of such release is grounded on the seisin, or estate, of the releasee. The same principles establish the right of the tenant by statute or elegit, to receive a grant or release, in enlargement of his estate, from the person whose possession is, by force of the execution, changed into a reversion: thus establishing the relative situation of a tenancy and seignior, between these parties: and it is incomprehensible on what ground the law should acknowledge the right of the tenant to surrender to the reversioner, and deny the right of the reversioner to make, or the tenant to receive, a grant or release in enlargement of the estate of the tenant. At the common law the debtor could not after execution, have conveyed to a stranger by feoffment, without the

consent of the tenant by elegit, &c. for the possession was in this particular tenant, and not in the debtor: hence the doctrine of *Lord Coke* (n),—"A tenant by statute merchant, or tenant by statute staple, or by elegit, *must also attorn*, for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and discharge the land. And if the reversion be granted by fine, they shall be compelled to attorn in a *quid juris clamat*."

If it be said that the tenant by statute, &c. comes in by act of law, or in the *post*, and not by privity of contract, the same objection would exclude a tenant in dower or by curtesy from taking a release in enlargement of the estate of that tenant, while it is an acknowledged proposition, that such tenant in dower, or by the curtesy, has an estate which may be enlarged by release.

As illustrative of this doctrine of privity, and as introducing a point, even applicable to the learning of releases, the succeeding passage may be added, namely :

"And so the executors that have the land until the debts be paid, must attorn upon the grant of the reversion, although they have not any certain term of years (o)."

(n) Co. Litt. 315. b.

(o) Co. Litt. 315.

And it may, therefore, be predicated of the tenancy of such executors, that their interest admits of enlargement by release ; nor would it be right to suffer the passage from *Lord Coke*, respecting the *venire facias ad computandum*, to find a place in this work, without observing that it affords an authority, that no one can purchase an estate held by statute or elegit without considering this interest to be redeemable by the reversioner, even at law on payment of the balance of the debt, *after deducting the sums levied, according to the extended value*, and the casual profits. In equity, except in cases in which the account is involved in difficulty from lapse of time, the account must be taken on the footing of the actual receipts, by the tenant by statute merchant, &c. (p)

From these observations, on the privity between the tenant by statute merchant, &c. on the one hand, and on the other hand, the person who has the ulterior interest, it follows, that a grant was the proper mode of transferring the reversion of the debtor to a stranger or third person ; and as the debtor might grant the reversion to a stranger by deed, without livery of seisin, why might he not grant his estate to the te-

(p) *Marsh v. Lee*, 2 Vent. 338.

Audely v. —, *Hardress*, 136.

Ess. on the Quant. of Est. chap. Terms of Years.

nant by statute, elegit, &c. Such grant to the tenant must, on principle, assume the name of a release, since it has all the qualities of that species of assurance.

The sole object of these observations is to lead to a certain knowledge of the principles on which the release is grounded ; and to endeavour to establish the general proposition, that every particular estate may, if properly circumstanced in other respects, be enlarged by the release of the person who has an estate in reversion or remainder.

All the books agree that when there is a *mere possession*, without any estate, a release cannot operate with effect. A person holding by sufferance, or a mere *trespasser*, has a mere naked possession, and no estate ; and this is the condition of a person who intrudes and claims to hold at will, but is not *admitted* to be tenant at will ; and a release to him could not operate with effect in that mode. He has no estate or interest capable of enlargement (*q*). And had not the authority of *Littleton* interposed and received the sanction of Lord Coke (*r*), there would have been considerable difficulty in admitting that a *cestui que trust* of the fee, who had the possession

(*q*) 1 Inst. 270. b. 271. a.

(*r*) Litt. s. 462, 463, and 464. and the commentary.

merely by the permission of the trustee, was qualified to receive a release, as an enlargement of his estate or interest under a permissive occupation. It is decided, that a mortgagor cannot, without an express contract, be charged with the payment of rent to the mortgagee, nor with a liability to rent in an action for use and occupation (a).

The case put by *Littleton*, in section 461, is the general authority that a *mere trespasser*, or a mere occupier, though he may claim to hold at will, has no estate; and that without an estate creating the relative situation of tenant, or *quasi* tenant, and lord or reversioner, there cannot be an effectual release by way of enlargement. At the same time that this section is urged, and its principle acknowledged, it is as already noticed rather a subject of surprise, that the law had not accepted the conduct of the parties, as evidence that the occupier consented to *be tenant* at will, and that the owner of the inheritance agreed to this tenancy; considering the release as the evidence and acknowledgment of the tenancy, and as the only means by which the release could be effectual by way of conveyance; and in modern practice no reasonable doubt can be entertained that under such circumstances the law would consider the

(a) The Contract is to pay interest and not to pay rent.

occupier, or the occupier by sufferance, as tenant at will.

This, indeed, is the law, as may be collected from Lord *Coke* (*s*) in his commentaries on Littleton, Sec. 461. though that part of the commentary, which applies the text to a tenant at sufferance, seems to be mistaken. The translation of the text inserting *the lease for a lease*, might easily have led to this mistake. Lord *Coke's* comments are in these terms. "De sa teste demesne occupia. Hee doth not say, de sa teste demesne *enter*, &c. so as this is to be understood of a tenant at sufferance, viz. where a man cometh to the possession first lawfully and holdeth over." And then Lord *Coke* gives the contrast in the following passage. "For if a man entreth into land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but he is a disseisor (*t*), and then the release to him is good (*v*); or if the owner *consented* thereunto, then he is a tenant at will, and that way also the release is good (*w*). But there is a diversitie when one cometh to a particular estate in land by the act of the

(*s*) 1 Inst. 271.

(*t*) At the election only of the rightful owner.

(*v*) By way of release of right in extinguishment of the right.

(*w*) Operating in this instance as a release in enlargement.

“partie, and when by act in law; for if
“the guardian hold over, he is an *abator*,
“because his interest came by act in law.”

Besides, since these observations were written, there is a decision which enforces this point (x). As this decision will be a leading authority for future practice, in the advice to be given by counsel on titles; and as a frequent reference will in the sequel be made to this decision, a full abstract of the case and opinion of the court in pronouncing judgment shall be subjoined.

In *Rees*, on the demise of *Chamberlain*, v. *Lloyd*, by an indenture, bearing date August the 27th, 1786, made between the defendant on the one part, and the lessor of the plaintiff on the other part; “the defendant
“did demise, lease, grant, set and to farm
“let to *Chamberlain* all that messuage, &c.
“situate in the parish of St. Martin’s, in
“the county of Pembroke, late in the occupation and tenure of — Phillips and
“his undertenants,” and now in the *occupation and tenure* of *Chamberlain* and his undertenants; habendum to *Chamberlain* for three lives, at the yearly rent of £80. The lessor of the plaintiff continued to occupy the premises so demised, till the fourth day of May last, when possession was given to the defendant by the sheriff, under

(x) *Rees v. Lloyd*, Wightwick, 122.

a writ of possession, in consequence of a judgment recovered by him at the spring great sessions for the county of *Pembroke*, and this ejectment was brought to regain the possession of the premises.

Upon the trial at the last assizes for the county of *Hereford*, the lessor of the plaintiff put in the above lease, upon which no memorandum of livery of seisin was endorsed. For the defendant, it was contended that the lease was a freehold lease, and livery of seisin was therefore necessary to perfect it ; and *Lawrence*, Justice, before whom the cause was tried, being of that opinion, the lessor of the plaintiff endeavoured to prove it by the evidence of *Peter Axton* ; who said, “ that he applied to the “ defendant in the year 1786, for the lease “ of the lands in question, who told him “ that he should have it, if the lessor of “ the plaintiff would be bound for him ; “ he afterwards carried a letter from the “ lessor of the plaintiff to the defendant, “ who upon reading it, said he had the choice “ between the witness and the lessor of the “ plaintiff ; and he accordingly chose the “ lessor of the plaintiff : the lease was prepared and granted, and I took possession : “ the lessor of the plaintiff told me he “ supposed I was to occupy, and I did so “ occupy accordingly ; the defendant made “ no objection. I have paid rent to the

“ lessor of the plaintiff many times, and
“ taken his receipts ; the lessor of the plain-
“ tiff was in possession of five fields for two
“ years ; I had the whole for eleven years ;
“ I took possession of the whole at first ;
“ he gave me permission to look after his
“ land ; he had other land ; he had no other
“ possession, except by my looking after it ;
“ the lease was given to me, and I afterwards
“ gave it to the lessor of the plaintiff : this
“ was three years after I was in possession.
“ Mr. *Chamberlain* sent me to a gentleman
“ at *Pembroke*, from whom I had it.”

Lawrence, Justice, upon this evidence observed that it was impossible for him to presume against the fact proved, and reluctantly directed a nonsuit.—A rule having been obtained, calling upon the defendant to shew cause, why the nonsuit should not be set aside, and a new trial granted ; the case was argued, and the court being desirous that it should be considered whether it was necessary for the lessor of the plaintiff to prove livery of seisin, in the present case, the argument was ordered to stand over ; and *Thomson*, Baron, said, that he wished it also to be considered, whether the livery of seisin could be presumed within the time at which it ceases to be necessary to prove the execution of a deed.

The case came on for a second argument, when it was fully argued, and after an ob-

servation from *Wood*, Baron, that *mere permission to occupy was a lease, and has been determined to be so* (y)—

Macdonald, Chief Baron, gave the judgment of the court to this effect.—“The nonsuit in the present case is sought to be set aside upon two grounds: first, that it ought to have been left to the jury, under the circumstances, to presume livery of seisin; and secondly, that livery of seisin was altogether unnecessary. Upon the first point, it was contended by the one side, that livery of seisin ought not to be presumed under thirty years, the period at which it becomes unnecessary to prove deeds; by the other side, that it ought to be presumed after the expiration of twenty, as possession for that length of time would bar a possessory action: I own, for myself, I think twenty years the best analogy. The learned judge, who tried this cause, thought that all grounds of presumption, in favour of livery of seisin having taken place, were removed by the evidence: now, it appears from the evidence that *Axton* was a candidate for the lease, that he was rejected, and the lease granted to the lessor of the plaintiff; *Axton* thereupon takes possession as his under-tenant: but there is nothing in all this to preclude the possibility of livery of seisin

(y) See 1 Inst. 271. cited *supra*, accordingly.

having been made to the lessor of the plaintiff, though there is sufficient to presume that *Arton* himself had none. Then it is allowed, that the necessity for livery of seisin was superseded, if there was any possession under the defendant; and to shew such possession, the words of the lease are referred to, stating that the lands "were in "the tenure and occupation of *Chamberlain* "and his undertenants." Now Lord Coke, Co. Litt. 352. b. says, indeed, "neither doth "a recital conclude, because it is no direct "affirmation;" but from *Rolle's* Abridgment, 872, it would appear that there is a distinction between a general and a particular recital: and though a general recital will not work an estoppel, yet the recital of a particular thing will have that effect; and here is a particular recital. Taking all the circumstances of this case into our consideration, we are all of opinion that this nonsuit should be set aside; I myself for the reason I have now stated;" and the rule for a new trial was made absolute.

To resume the subject. Since *Littleton* wrote his invaluable Treatise on Tenures, there have been successive decisions, all tending to the conclusion, that the acts of parties shall be construed in such manner that they may be operative rather than fail of effect: thus a lease by tenant for life, and by a remainder-man in fee, is in the

first place the lease of the tenant for life and the confirmation of the remainder-man, and after the death of the tenant for life, is the lease of the remainder-man, and the confirmation of the tenant for life (z). So, a feoffment by a tenant for life, and a remainder-man by *deed*, is the feoffment of tenant for life, and the conveyance or confirmation of the remainder-man, since the remainder may pass by the operation of a deed as a grant; but a feoffment of the same persons *without deed*, is the feoffment of the remainder-man, and the surrender of tenant for life, inasmuch as the remainder could not pass from the remainder-man for want of a deed of grant, unless it passed by the operation of the livery (a).

Instances of this sort might be multiplied to any extent. The point, however, which seems most relevant, is that which concerns the doctrine of feoffments. A man who enters, claiming under a void feoffment, or a void grant, is considered as entering by disseisin (b); as the only means of giving an incipient title, to become a complete title eventually under the doctrine of descents which toll entries, warranties, and the like; or the more mo-

(z) 1 Inst. 45. a.

(a) Bredone's Case, 1 Rep. 76.

(b) Litt. section 70.

dern doctrine by which the title may be rendered complete under the operation of a fine and non-claim, or under the statute of limitations. As often as a man enters with an intention to receive livery of seisin, he must be in possession, either by trespass, or by disseisin, or without any wrong; and as an adverse possession in him would intercept and defeat the right of the owner to make a feoffment without first ejecting the intended feoffee, the law treats the intended feoffee as neither tenant, disseisor, or *possessor*. It assumes that his possession is the possession of the real owner, the intended feoffor, or is merely a permissive occupation.

Nor would it be right to dismiss the section of *Littleton* which has called forth these observations, without remarking that the rightful owner might have treated the person thus claiming to occupy at will as a trespasser, or as a disseisor at election; for every person who enters wrongfully, is necessarily a trespasser, and the freeholder may at his election treat the trespasser as a disseisor (c), and as the trespasser cannot qualify his own wrong (d), every disseisin, (except, perhaps, as already stated, the particular and special case of a disseisin of the tenant of a particular estate, under a claim

(c) *Blunden v. Baugh*, Cro. Car. 302.

(d) Inst. 271. a.

of his es'ta e only,) is necessarily a disseisin of the fee-simple, and the disseisor is capable of a release from the disseisee in extinguishment of the right. *Littleton* must be read merely as putting a particular case, with special circumstances, and drawing his conclusion upon these circumstances, and for the sake of illustrating his doctrine by a distinction: and the case must be judged of by the facts as stated, without giving to them a new or different application, or allowing any of the inferences or presumptions of law. In this view of the case, the point of *Littleton* is correct, that a man who has merely the occupation of lands, without any estate, is not capable of a release.

The context of *Littleton* sufficiently demonstrates, that in the section which has given rise to these observations, the author was treating of the possession of a wrong doer, and not of a *tenant by sufferance*.

Another point to be collected from the same section is, that no one can, by claiming to hold at will, become tenant at will without the consent and acceptance of the owner, for the tenancy must be at the will of both parties (e).

(e) 1 Inst. 55, a.

The text of *Littleton* is also full and explicit on the point, that a person who has merely a *right of entry* or of *action*, is not capable of this species of assurance. The language of this text writer (*f*) is, "If a lease be made to one for a term of life, reserving to the lessor and his heirs a certain rent: if the lessee be disseised, and after the lessor release to the lessee and his heirs, all the right which he hath in the land, and after the lessee entereth, albeit in this case, *the rent is extinct*, yet nothing of the right of the reversion shall pass." The rent will be extinct, because of the privity of contract, for the rent is payable notwithstanding the disseisin, since there is not any eviction under an elder title; but the disseisin of the lessee, is a disseisin of the lessor, so that the lessor has no estate to grant, nor the lessee any estate capable of enlargement.

It may in this place be noticed, that *every general disseisin acquires a fee-simple by wrong*. Hence Lord Coke (*g*) has this passage. "A man disseiseth tenant for life, to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in reversion is a disseisor in fee; for by the disseisin made by the stran-

(*f*) Litt. sect. 456.

(*g*) 1 Inst. 180, b.

“ger, the reversion was divested, which, say
“they, cannot be revested by the agree-
“ment of him in the reversion: for that it
“maketh him a wrong doer, and therefore
“no relation to an estate by wrong can help
“him.” Lord *Hobart* (*h*), accounts for this
point of law by these observations: “A
“grant to I. S. and his heirs during the life
“of I. D. is no fee, but a special occupancy
“as is resolved in *Chudleigh’s* case; but a
“disseisin of an estate for life, by neces-
“sity in law, makes a *quasi fee*, because
“wrong is unlimited, and ravins all
“that can be gotten, and is not governed
“by terms of the estate, because it is not
“contained within rules.”

When a lessor disseises his lessee, the lessor, it is true, is a disseisor; but if he conveys the fee, the lessee for life may restore his seisin, without defeating the estate which has been conveyed, to any greater extent, than for the life-interest (*i*).

According to the authorities collected from Lord *Coke’s* Commentary, and from Lord *Hobart’s* Reports, every disseisin, even under a claim of a particular estate, must necessarily be a disseisin or divesting of the estate of the reversioner or remainder-man; and yet it is acknowledged as a

(*h*) Hob. Rep. 333.

(*i*) 1 Inst. Cl. Confirmation.

proposition of law, that one man ~~may~~ enter claiming the term of years of another person, without divesting the reversion (*k*) ; and it should seem on principle, that a disseisin of a tenant for life, or of a tenant in tail, merely claiming *his estate*, would not be a disseisin of the reversioner or remainderman, except at his election. He may, perhaps, for this is doubtful, elect to be disseised, by denying any privity between him and the disseisor, and treat the disseisor as a wrong doer, and not as his tenant. On the other hand, what reason is there against his acceptance of the new tenant. It is agreed that a disseisin of the tenant for life, of the *King*, is a disseisin for life only (*l*). The ground of this point is, that the *King* cannot, on account of his prerogative, be disseised : and therefore, if the *King's* tenant for life be disseised by two, and he releaseth to one of them, the releasee shall hold out his companion : for the disseisor gained but the estate for life (*m*). And the next observation of Lord Coke is still more material, when he adds (*n*), “ So if *joint-tenants* make a lease “ for life, and after do disseise the tenant “ for life, and he release to one of them,”

(*k*) See *infra*, 3 Lev. 35.

(*l*) 1 Inst. 276. a.

(*m*) 1 Inst. 276. a.

(*n*) *Ib.*

(the releasee) " he shall hold out his companion : for the disseisin was but of an estate for life."

The next proposition in Lord Coke (o), is, " If tenant for life be disseised by two, " and he in the reversion, and tenant for life join in a release to one of the disseisors, he shall hold his companion out ; " and yet it" (the release) " cannot enure " by way of entry and feoffment. But if they " severally release their several rights, " their several releases shall ensure to both " the disseisors." In this instance the disseisin was of the fee-simple, and not merely of the life-estate. A release by both jointly would give the entire fee-simple ; and therefore would annex the right of the fee-simple to the possession : but a release by either, or by each separately, would merely annex the *right of his estate* to the possession, and the possession could not by such release be made rightful ; either for the estate for life, distinct from the reversion, or for the reversion distinct from the estate for life ; for this would be to make a fraction of interests against the maxims of law ; a particular estate without any reversion expectant on that estate : a difficulty which does not occur when a

(o) 1 Inst. 276. a.

tenant of the immediate reversion disseises his own tenant for life; for then it may be said, he merely claims and resumes the estate for life: for when there are interposed estates, it is agreed, that a disseisin of the tenant for life, unless it be special, and confined to the life-estate, will be a disseisin to those in remainder and reversion, so long at least, and perhaps, so long only, as the interest under these particular estates shall continue.

It remains only, that a few authorities should be adduced, in proof that there may be an ouster of a tenant for years, merely claiming his estate, without being a *disseisin* of the reversioner; and that there may be a disseisin of a tenant for life, by an entry, claiming his estate, without any disseisin of the reversioner.

The case of *Kirton* against *Birling* and *Trappes* (a), is material to the point now under consideration. In an action of entry in the *quibus* in nature of assise, *Birling* pleaded non-tenure in abatement of the writ. *Trappes* took upon himself the entire tenancy, without this, that *Birling* had any thing on the day of the suing out of the writ, or at any time since; and

(a) Dyer, 134. b.

pleaded a bar, *scil.* the feoffment of one *Walker* and one *Hylton* to him in fee, and gave colour to the demandant by the same feoffors. The demandant as to the plea of *Birling*, in abatement of the writ, averred him and *Trappes* tenants of the freehold, as the writ supposed; and this he prayed might be enquired of the country, and *B.* did the like. And as to the plea in bar of *T.*, he said, that *William Kirton*, his father, was seised in fee, until by the said feoffors disseised, who being then in by disseisin, enfeoffed *Trappes* as above; and afterwards *William* the father died, and the demandant as son and heir, entered upon *Trappes*, and was seised in fee as in his remitter, until by *B.* and *T.* disseised, &c. and made no averment of his plea in the conclusion, "and this he is ready to verify, &c." To which *T.* rejoined as above in bar, and traversed the disseisin made by the said feoffors upon the father of the demandant, upon which point they were at issue: and at the day when the inquest appeared, the demandant would have relinquished his first issue, because it was unnecessarily joined, since the demandant was not bound to maintain his writ, but might demur to the plea of non-tenure of the one, and answer the bar of the other; and the maintaining the writ was only to the damage of the

defendants ; but notwithstanding this, the court would not permit it. And upon the evidence to prove joint-tenancy, it appeared, that *B.* before entry of the demandant, was termor, or lessee at will, to *T.*, and that he paid rent to him, and that he re-entered upon the demandant, claiming the former estate ; and by the opinion of the court they are *disseisors* and tenants, because the termor cannot qualify his own wrong, &c. And at last a verdict was given for the plaintiff on both issues, &c. and judgment given accordingly. The ground of this case is, that by the re-entry of the disseisee, the lease was avoided, and the subsequent entry of the lessee was tortious to the owner of the inheritance. It was not confined to an *existing estate*, for no estate existed, and for that reason the rightful owner was at liberty to treat the former lessee entering wrongfully, as a disseisor. This decision then does not impugn the point, which it is the object of these observations to establish.

And the case of *the Mayor and Commonalty of Norwich v. Johnson* (*b*), supports this distinction. In that case, the

(*b*) 3 Lev. 35, 3 Mod. 90. S. C.

plaintiffs in an action of waste declared upon " a lease for thirty-one years made " to one *Cooke*, and that he died, and the " defendant being an executor to *Cooke*, " entered and did waste. The defendant " pleaded that *Cooke* died intestate, and " that administration was not granted to " him, nor the term assigned to him by " *Cooke*, or any administrator of *Cooke*; the " plaintiffs replied, that the defendant " after the death of *Cooke*, entered as executor, and did the waste: upon this the " defendant demurred, and it was argued, " in support of the demurrer, that one " could not be a tort executor of a term, " for no man can apportion his own wrong; " but if a man enter tortiously, he is a disseisor and not a termor. And cases were " cited that a tortious entry makes the party a " disseisor in fee, though he claims a particular estate only. But after time taken " to consider, judgment was given for the " plaintiff, for in the cases cited, there was " no particular estate, or term, in esse: and " the claim of the tort-fesor cannot create a " particular estate, and so apportion his own " wrong: but of necessity, he is a disseisor " in fee; because there is no particular or " other estate in esse. But in the case at " bar, there was a rightful term in esse, and " he in reversion cannot maintain trespass " during the term: and therefore, it is rea-

“sonable that he should have his remedy upon the contract, against him that claims to be in by the contract.” And it was said, *Moor*, pl. 126, “it seems to be admitted that there may be a tort executor of a term.”

This case, with the comment on the former cases, proves that a person who enters, *claiming a term*, where there is such a term, or who enters claiming any particular estate, where there is such particular estate, may become tenant for that particular estate, by the dispossession of the termor or disseisin of the owner of the particular estate; without divesting the estate of the person, who has the reversion or remainder, or committing any wrong beyond the particular estate.

It is true, that *Popham*, Chief Justice, did in *Helyar's* case (c) say, “a lease for years cannot be gained but by lawful grant; and therefore, when one claims a lease for years, and the other claims by an elder grant, there he shall traverse the latter grant, but the other party shall traverse the elder grant, or show how he came to it again, to enable the second grant. But it is otherwise in case of a feoffment;

(c) 3 R. 4.

“ for there, if the other party claims by a
“ former feoffment, he ought to confess and
“ avoid the latter feoffment as by disseisin,
“ &c. For a *disseisor may gain an estate in fee,*
“ *but none can gain an estate for years, but*
“ *by lawful conveyance,* and so is the differ-
“ ence. And when he claims by a for-
“ mer assignment of a term, it will be im-
“ pertinent to traverse *absque hoc*, that he
“ after that, assigned his interest ; for per-
“ adventure he assigned all his interest,
“ and yet had nothing therein.”

But this judgment cannot be urged against the decision to be collected from the report of *Levinz* ; for *Popham* was treating of the *creation* of estates ; and it is true that a particular estate cannot be created without a lease, a grant, &c. but nothing advanced by *Popham*, denies that when there is a *particular* estate actually existing, there may not be an ouster or a disseisin confined to that particular estate, so as to leave the estate of the reversioner or remainder-man, *volens volens*, a subsisting estate ; and admitting the reversion or remainder to be a subsisting estate, then it follows that there is not a disseisin of the *fee-simple*.

The case of the disseisin of the tenant for life of the *king* is material as an authority to this point. And it may be added, that when a tenant *pur autre vie* dies tenant, and

a stranger enters generally, he will by construction of law, be tenant for the life, thus filling the tenancy for that particular estate.

And it may readily be conceded, that when there is not any particular estate, or when the entry is general without a claim confined, in terms or by the circumstances to the *particular* estate, there will be a disseisin of the fee-simple.

But from all the cases and general principles, it may be collected that there can be a disseisin for a particular estate in those instances only in which there is a particular estate, and the entry is made, claiming that estate; and the lord, it should seem, may make such disseisor his tenant, by acceptance of rent from him; and after acceptance of rent, there are strong grounds for contending that the disseisor would be so connected in privity with the lord, as to be capable of a release in enlargement of his estate, giving the disseisor a good title against the lord, but leaving his title open to be impeached by the rightful owner of the particular estate.

These observations on the effect of disseisin, ouster, &c. of the owners of particular estates, under a claim of their estates, are intimately connected with the learning to be discussed under the next head, viz.

the privity requisite between a releasor and releasee.

Thirdly, Who may be the releasor, and who may be the releasee in respect of privity of estate.

That the release may operate as an enlargement of an estate, three circumstances are requisite.

1st, That the releasee should have a *vested* estate.

2dly, That the releasor should have a *vested* estate in reversion or remainder, expectant mediately or immediately on the estate of the releasee.

3dly, That there should be a *privity* of estate between the releasor and the releasee.

The two first points have been fully discussed under former divisions; and it has been shewn that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory interest (*d*), as an interest depending on an executory devise; nor is it sufficient that he should have a *mere right* or title of entry, as a lessee for life, after he has been disseised, or as a lessee for years, after he has been ousted, and while

(d) Litt. 459.

his interest remains a mere right or title of entry.

On the contrary it is necessary that the releasor and releasee should stand in the relation to each other, either of *lessor* and *lessee*, or in the relation of a particular tenant and remainder-man, or particular tenant and reversioner, so that there may be a *privity of tenure* between them.

The lessor may enlarge the estate of his lessee; and for all the purposes of this doctrine, the *assignee* or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether *heir* or *devisee*, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving such enlargement continues, although the lessee, &c. or his assignee, create a particular estate, derived out of his own estate; and although the reversioner create a particular estate, which is interposed between the interest of the particular tenant and the reversion; for notwithstanding such particular estates, there is a continuing privity between the lessee, or his assignee on the one hand, and the reversioner or his assignee on the other hand; and yet an estate created out of a particular estate, is not, *during such particular estate*, capable of enlargement by release of the remainder or reversion, expectant on such particular

estate. This is from the want of privity. The material rule of law applicable to this subject, seems to be, that the particular estates, the remainder and the reversion, are parts of the same estate. There is a connection between the tenants of these estates as having interests depending on one and the same seisin(e).

In order to understand this subject scientifically, and on the principles of law which govern this doctrine, it will be proper to consider the law under the following subdivisions :

1. The general nature of privity between tenants.

2. The cases of immediate privity.

3. The cases of privity, notwithstanding a mesne estate.

4. Cases of privity ; because a derivative estate is discharged from its original privity.

5. The cases of want of privity.

1st, Because there is mere *privity of tenure*, for the sake of remedy, and not of estate.

2dly, Because the estate is assigned.

(e) 2 Black. Com. Ch. Remainders, &c.

1 Inst. 345. Litt. s. 673.

Goodright v. Forrester, 1 Taunton, Arg. 602.

3dly, Because there is no estate; but only a right or interest.

4thly, Because the estate is derived out of a *mesne* subsisting estate.

5thly, Because the estate *is determined*.

After an examination of these points, this division will be concluded with some general practical observations.

Of the general Nature of Privy, between Tenants.

Lord Coke (*f*), treating of privies, observes, "Privy, in the understanding of the common law, is fourfold :

"1st, As privies *in estate*, as between the donor and donee, lessor and lessee, which privy is ever immediate.

"2d, Privies *in blood*; as the heir to the ancestor, or between co-parceners, &c.

"3d, Privies *in representation*, as executors, &c. to the testator.

"And 4thly, Privies *in tenure*, as the lord and tenant, &c. which may be reduced to two general heads, privies in deed, and privies in law."

The nature of the privy required, to the validity of a lease and release, is that which subsists between a particular tenant

(*f*) 1 Inst. p. 271. 354. b.

and reversioner, or a particular tenant and the person who has a remainder expectant on the particular estate.

Thus, if A. be tenant for life, or for years, with reversion to B. ; or if A. be tenant for life, or for years, with remainder to B., the estate of A. may be enlarged by a release from B. The common assurance by lease and release, is in effect this particular case of an enlargement of an estate for one year, by a grant of the reversion, from the owner of the reversion, to his own lessee, under the lease for a year.

Thus, to qualify a tenant to receive a release, it is not sufficient merely, that he should have the *possession*, or that he should have a *vested* estate : there must be a connection in point of tenancy, or, as the law terms it, a privity, between the releasor and releasee : hence the observation, that " It " is a certain rule, that when a release doth " enure by way of enlarging of an estate, " there must be privity of estate, as between lessor and lessee : " and mere privity, without estate, will not suffice (g). " As if an infant makes a lease for life, and the lessee granteth over his estate with

() 1 Inst. 273. 372. h.
See Shep. Touch. C. Rel. 322.

“ warranty, the infant at full age, bring-
“ eth a *dum fuit infra ætatem*, the tenant
“ voucheth his grantor, who entereth into
“ warranty, the demandant releaseth to
“ him and his heirs: here is privity in
“ law, and a tenancy in supposition of
“ law: and yet because he, *in rei veritate*,
“ hath no estate, it cannot enure to him
“ by way of enlargement; for how can his
“ estate be enlarged, that hath not any?
“ If the tenant by the curtesy grant over
“ his estate, yet he is tenant as to an ac-
“ tion of waste, attornment, &c. and yet a
“ release to him and his heirs cannot enure
“ to enlarge his estate, that hath no es-
“ tate at all.”

It follows, that in order that an estate may be enlarged, there must, as between the releasor and releasee, be privity of connection, and privity of estate, as is the case between lessor and lessee, donor and donee (*h*); or between the person who has a particular estate, and the person who hath the reversion; as tenant by statute merchant, and the person on whose seisin the extent was sued,

It is also to be remembered, that the estate, as well as the privity, must continue down to the time at which the release is

(*h*) 1 Inst. 272, b.

made ; for *mere privity* without an estate, or an estate without privity is no foundation for a release (i), as will be shewn under the divisions of this head.

In *Sheppard's Touchstone* (k), there is this passage :—" So also, if *donee* in tail " make a lease for his *own* life, and after " donor release to donee and his heirs, it " seems this is not a good release." It is difficult to comprehend the objection against this release. The law is now well understood to be, that the donee retains a reversion, and the privity between him and the former reversioner continues, and he is still tenant in tail, notwithstanding the grant for his own life (l).

The case of a *donee* is probably inserted for that of a *lessee*. Lord Coke puts the case of a release to the lessee. The release as made to the lessee, was open to the objection, that the privity was between the donor and donee, and not the donor and the lessee of the donee.

The same principles *mutatis mutandis* apply to particular tenants, whose estates are to be enlarged by *remainder-men*, and also to remainder-men by whom grants

(i) Litt. 461. 1 Inst. 273. a. 296.

(k) Shep. Touch., p. 323.

(l) Machel v. Clarke, 2 Lord Raym.

may be made, in enlargement of particular estates.

It is immaterial whether the remainder or reversion be for life, in tail, or in fee, except that alienation by tenant in tail will not be binding, as far as it depends on the release, to the prejudice of his issue. Hence, as will be collected from former observations, a tenant in fee or in tail (*m*), as well as a tenant for life, is competent to convey by lease and release. A seisin in law will also suffice for the ability to make, or capacity to receive, the release.

And whether a person hath the estate in his own right, or in right of his wife (*n*), that estate is equally capable of enlargement.

And it is immaterial whether the estate which the husband has in right of his wife, be an estate for years, which he may absolutely alien, or for life, and consequently of freehold, which he alone cannot alien as against his wife.

The estate which one has in the right of a testator or intestate, or as a trustee, is also capable of enlargement. Thus a man who hath a term for years as executor, is capa-

(*m*) *Machel v. Clarke*, 2 Lord Raym.

(*n*) 1 Inst. 173. 299.

Shep. Touch. 321.

ble of a release in enlargement of his estate, and a release to a husband seized or entitled in right of his wife may operate, whether made to him solely or to him and his wife jointly; and when the grant by way of release is to him and his wife, the inheritance may pass to one or to both, agreeable to the intention of the parties (o).

And though a tenant for twenty years in possession, make a lease to B. for ten years, and B. enters, and he in the reversion release to the original lessee for years, this will be a good release to enlarge his estate. Between the releasor and releasee, there is a continuance of privity; but as will be observed under the proper division, there is not any privity between the under lessee, (the tenant for ten years) and the reversioner in fee (p), while the estate for twenty years continues. A release from the owner of the fee, to the under-lessee, during the term of twenty years, cannot operate to the enlargement of his estate, though it may operate as a grant to him, in the same manner as it might operate as a grant to any stranger.

So if tenant in tail create a particular estate for life, the person who hath the re-

(o) Shep. Touch.

(p) 1 Inst. 273, a.

remainder or reversion in fee, cannot enlarge this estate for life, by release, because there is not any privity between the estates of the releasor and releasee (q).

The privity is twofold: First, between the tenant for life, or in tail, and his tenant; secondly, between the tenant for life or in tail himself, and the person who hath the remainder or reversion in fee.

That a release may operate in enlargement of estate, it must be either from the tenant in tail to his own lessee, or from the person who hath the remainder or reversion in fee to the tenant in tail. For it is the particular property of this species of assurance, that it should proceed from one who has an estate in reversion or remainder, in favor of a person who has a *prior* particular estate. This is implied in the nature of the assurance, and from its mode of operation, to enlarge the estate *of a tenant*; while a grant proceeding *from a tenant* to the person who has the next vested estate, in remainder or reversion, does, instead of enlarging the interest of the grantee, cause the *merger, surrender, or extinguishment* of the particular estate.

A surrender or release of right to the remainder-man or reversioner, may enlarge

(q) 1 Inst. 273.

or accelerate his right to the possession, by rendering it more beneficial, though it cannot give any extension, in point of legal duration, to the estate of the grantee.

Let a tenant for life accept a surrender of a term of years, the tenant for life has still a mere life-estate. So, if A. be tenant for life, with remainder to B. for his own life; a surrender from A. to B. would leave B. in the condition of being tenant for his own life, so that his estate would determine on his death in the lifetime of A.; while if A. had accepted a release from B., the estate of A. for his life, as it is larger than the estate he receives from B., would enable A. to hold for the lives of A. and B., because no merger would take place, since a subsequent estate cannot merge in a prior estate. This is a singular and peculiar instance. So if A. and B. had joined in a grant to C. for their lives, there would be an union or consolidation of estates, without merger, and C. would be entitled to hold for the several lives; while under distinct grants from A. and B., the estate for the life of A. would merge in the estate for the life of B.

The more obvious case for exemplifying the doctrine, is, that if A., tenant for a thousand years, leases for nine hundred and ninety-nine years, he still retains an estate for a thousand years; he has a reversion. The under-lease merely excludes him from

the possession. He is capable of a surrender, and after surrender of the nine hundred and ninety-nine years, he will have precisely the same estate as formerly—neither more nor less than the residue of the term of a thousand years (a).

Again, if A. be tenant for twenty years, with reversion to B. for ten years; or A. be tenant for ten years, with reversion to B. for twenty years, in either case, the estate of B. will not be enlarged or extended by the purchase of the prior estate; but by the merger of the prior term, he will have the right of enjoyment for the period of that estate which belonged to him before he purchased the first term.

These cases apply only when B. has a reversion; for when his interest is an *interesse termini*, to commence on the merger, surrender, or determination of the prior term; then there are in effect two distinct periods for enjoyment, one independent of the other. The times of enjoyment are not concurrent. They do not fill the same space of time; and for that reason, B. by acquiring the estate of A., does in effect and in law, acquire a distinct interest, which will confer on him the right of enjoyment for the period which is to elapse in the interval, before the commencement of the in-

(a) *Challoner v. Davies*, 1 Lord Raym. 403.

terest which was in B., before he acquired the estate of A.

Lord Coke (*r*), indeed, observes, "If a man make a lease for ten years, the remainder for twenty years, he in remainder releaseth all his right to the lessee, he shall have an estate for thirty years."

The alledged reason is, "one chattel cannot drown another, and years cannot be consumed in years(*s*)."¹ The reason as applied to merger is not correct. If the point be law, it turns on the circumstance that the remainder is added by the grant of its owner to the prior estate: thus making a distinction on the one hand between a release by the remainder-man to the prior tenant, and on the other hand, a surrender from the prior tenant to the owner of the remainder.

It is also to be noted, that the mere circumstance that the grantor has a prior estate, is not any impediment to the right of his making a release, in respect of another estate held in reversion or remainder, expectant on the estate of the grantee. Let it also be remembered, that the doctrine of releases in enlargement of estates, depending as it does entirely on privity, necessarily requires that the release should

(*r*) 1 Inst. 273. b.

(*s*) *Challoner v. Davies*, 1 Lord Raym. 402.

proceed *from* the person who hath the remainder or reversion, *to*, or in favor of, the person who hath a *particular* estate ; for every assurance proceeding *from* the owner of a particular estate, must be either an *under lease* or a *surrender*, or when there is an intermediate estate, an *assignment*.

But when the conveyance is made by lease and release, the parties change their relative characters : the lease, though made by a particular tenant, creates a privity between him and the lessee, and such lessee becomes capable of a release in enlargement of his particular estate, created by the lease, without any objection arising from his having the remainder or reversion under a more remote estate.

Cases of immediate Privity.

The cases of immediate privity are between a lessor and his lessee ; a tenant for years or for life, and the person who has the immediate reversion, or remainder in fee, for life, or in tail ; between a copyholder and the lord ; between a *cestui.que trust* and his trustee ; a tenant by statute or elegit, and the person who has the reversion or estate of the debtor. And in all cases, the *assignee* of the particular tenant may be considered as standing in his place ; and the as-

signee of the reversioner or remainder-man, may be considered as standing in his place. The examples which have been adduced under former divisions, sufficiently illustrate this part of the subject.

There is abundant authority, as will appear in former parts of this chapter, to prove, that an estate is capable of enlargement, although that estate does not confer a right to the *immediate possession*. It is evident that the word *possession*, as it occurs in different writers, is to be referred to an *actual*, or *vested estate*, whether in possession, reversion, or remainder; not to an estate necessarily attended with actual possession, or the right to the immediate enjoyment of the possession.

Cases of Privity, notwithstanding a Mesne Estate.

When there are three estates, as to A. for life or for years, remainder to B. for life or in tail, reversion to C., in this case, B. may, by release, enlarge the estate of A. and C. may enlarge the estate of B. To this extent the law is clear, for the estates of the releasor and releasee are immediate; for the remainder-man is immediate

tenant to the reversioner. The same connection would exist between the tenant in fee, and the remainder-man for life, even though the fee had been granted by way of remainder, instead of being retained as a reversion: and for that reason a release from the owner of the remainder in fee to the owner of the estate for life, would be good.

It is agreed, that as between a *particular tenant* and a *reversioner*, it is not necessary that the estate to be enlarged, and the estate of the person who releases, should be *immediately* expectant: therefore, if a man make a lease for years, the remainder for life, a release by the lessor to the *lessee for years*, will, notwithstanding the interposed estate *for life*, be good; for the lessee for years hath both *privity* and estate (*s*).

Whether (*t*) a person who has a remainder in fee, can under these circumstances, enlarge the first particular estate, while the mesne estate continues, is a point as to which the books are involved in much confusion.

According to *Sheppard's Touchstone* (*u*),
“ If there be tenant for life, remainder in

(*s*) 1 Inst. 273. a. Litt. s. 465.

Gilb. Ten. 70.

Shep. Touch. 322, 323.

(*t*) 1 Inst. 273. a.

(*u*) Shep. Touch. 321.

“tail, remainder in fee, and he in remainder release to tenant for life, this will not increase his estate.”

The only objection against the release, must be the interposed estate-tail; and perhaps, *Sheppard* merely intended to express that which is correct in point of law; namely, that the estate of the tenant for life would not, by force of the release, be enlarged, so as to merge or extinguish the estate for life, and exclude the mesne estate.

Considered in any other sense, *Sheppard* is not consistent with himself; for in another page (v), he admits that if A. be tenant for life, remainder to B. in tail, remainder to C. for life; remainder to A. in fee, and A. die, and his heir release to B., being in possession, this is a good release, and gives the fee-simple: and the case of *Francis v. Pack* (w), was attended with these circumstances, and received a decision in favour of the release. In this, as well as in the former instance, the release proceeded from a person who had a remainder in fee, and there was an intermediate estate, and the interposed estate of freehold did not prevail as an impediment to the validity of the release; and in another passage

(v) 323.

(w) 1 Rol. Abr. 400.

in 2 *Roll's Abridgment* (x), it is said to be admitted by *Finchden* (y), that if there be a lease for life, remainder for life, remainder in fee; he who has the remainder in fee, may enlarge the estate of the lessee; and yet it must be remembered, he had the first estate for life. The position in *Sheppard*, therefore, seems to have been inserted, either without sufficient authority, or under the impression which is stated.

On principle, and also on authority, it seems that a grant from a remainder-man, as well as a reversioner, may operate by way of release in favor of a particular tenant, notwithstanding a mesne or interposed estate (z). So when there is tenant for life, remainder in tail, remainder in fee, and he in remainder in fee releases to the tenant in tail, this will clearly increase, or make an accession to his estate, being a case of immediate privity: and it is admitted by all the books, and even by *Sheppard* in his *Touchstone*, (a) that if the fee be held by way of reversion, instead of re-

(x) p. 400. pl. 3.

(y) 44 Assize, 35.

(z) Co. Litt. 273. a.

Shep. Touch. 321.

(a) Shep. Touch. 326.

1 Inst. 273. a.

mainder, the owner of the fee may enlarge the estate of the first tenant, notwithstanding the mesne estate.

Sometimes, however, the effect of a release to a tenant for life, by a remainderman or reversioner, will be to *exclude* a mesne remainder.

This happens, when the mesne *interest* is a *contingent* remainder of freehold. In this instance, by the enlargement of the particular estate by the grant to the tenant of the reversion or remainder, the contingent remainder will be deprived of the support of the particular estate, on which it depended for effect, and will, for that reason, be destroyed.

But if there had been any other particular estate by which the contingent remainder was supported, and which either preceded the estate of the releasee, or which was interposed, and prevented the merger : in either case, the remainder would be preserved, at least during such particular estate. But the particular estate and the contingent remainder must bear to each other the characters and relation of a particular estate and remainder. Thus if A. be tenant for life, with reversion in fee to B., and B. grants to C. for life, with remainder in contingency to D. for life or in tail, with remainder to E. in fee, or retains the reversion ; the enlargement of the estate of B.,

while the remainder of C. is in contingency, would destroy the contingent remainder, notwithstanding the continuance of A.'s estate.

On the other hand, if A. be tenant for life, remainder to B. for life, remainder to C., either for life, or in tail, in contingency, with remainder or reversion in fee to D., the enlargement of the estate of A. or of B. by release, would not destroy the contingent remainder, while it retained the support of the estate of A. or of B. as a distinct and subsisting estate.

But let it not be forgotten, that by the union, or merger, or surrender of one particular estate, the union, the surrender, or merger, of another estate, and the consequent destruction of a contingent remainder may be effected.

These instances of the destruction of contingent remainders, must be confined to legal interests. Contingent remainders of trust or equitable interests, do not admit of destruction by the merger or enlargement of the particular estate.

It remains to be noticed, that in *Francis v. Pack* (b), already cited, as the case of A. tenant for life, with remainder to B. in tail, with remainder to A. in fee; it was

(b) 2 Roll's Abr. 400. pl. 7.

held, that by release, A. might transfer his remainder *in fee* to B., who was the remainder-man in tail, but that he could not transfer his estate for life to B. This conclusion is right, as applicable to the technical doctrine of releases. At this day it is highly probable and almost certain, that the release would be construed as a surrender of the estate for life, as well as a grant by way of release of the remainder in fee. In one case A. was tenant for life, with remainder to B. in fee, and A. leased to C. for years: it is obvious, B. could not have released to C., for want of privity while he remained the tenant of A. And yet a release from A. and B. jointly to C., was held to operate to enlarge the estate of C. into a fee. The only ground on which this release could be supported *as such*, is, that it had effect first as a release from A. to C. and afterwards as a release from B. to C. ; so that it first passed in construction of law, the estate for life, and then enlarged the estate for life into a fee-simple.

Cases of Privity, because a derivative Estate is discharged from its original Privity.

It has frequently been stated, and will be more fully shewn, that a derivative estate

cannot be enlarged by a release to the *under-lessee*, while the estate of the lessor, who granted the estate of the under-tenant, shall be continuing. When that estate shall be determined, as it may be by merger, surrender, &c. without defeating the estate of the under-tenant; (for the rule of *cessante statu primitivo cessat derivativus*, admits of these exceptions:) then it should seem from principle, that there will arise a connection between the *under-tenant*, and the person who has the next vested estate, so that the relation of lord and tenant will exist between them for the purposes of waste, surrender, and merger, and of consequence, to enable the person who was an under-tenant, and who is now discharged from that relation, to become a releasee in enlargement of his estate. This point will be more fully discussed under a subsequent division.

Of want of Privity.

1. *Because there is mere Privity of Tenure for the sake of Remedy, and not of Estate.*

It is not sufficient that there should be merely privity of person or connection by way of remedy, with the reversioner or remainder-man. There must be privity of continuing estate between the releasor and releasee. This is evident, from the case of

tenant by the *curtesy*, who has *aliened* his estate. Though he remains, for some purposes, tenant to the reversioner, as for instance, to be liable to an action of *waste*, yet as the *privity of estate* has ceased, he is no longer capable of this release.

The like observation is applicable to a tenant for years, who has been ousted from his term, or of a tenant for life, who has been disseised of his estate for life, by a person who enters claiming that estate, without disseising the owner of the reversion or remainder. Such termor, for years, or life, having a right of entry only, is *very tenant*, and capable of a release of *rent* or *services* (c).

But for the want of *privity in tenure*, and also of estate, this species of release cannot be made to a quondam tenant for life, or tenant in tail, after the reversion or remainder has been divested or discontinued by a tortious alienation, and while the reversion or remainder continues a mere right of entry or of action.

Also, after a disseisin of a tenant for life, merely claiming his estate, the reversioner or remainder-man cannot release by way of enlargement to the *disseisee*. He may release the services to him in extinguishment of these services; or he may grant to

(c) Litt. 454, 455, 456, 457, 458, 465.

him, as to any other stranger, the remainder or reversion, admitting it to be, as it is understood to be, a subsisting estate.

Also, after an assignment by a tenant for years, or for life, the original tenant for life, may, by virtue of some express covenant, or until acceptance of the assignee as tenant, remain liable to rent, covenants, &c. &c. and yet he will be incapable of a release by enlargement. This impediment arises from the want of estate.

The releasor must also have an estate in remainder or reversion, expectant on the estate of the releasee. Acts proceeding from a particular tenant (*d*), for the benefit of a person, who has an estate in remainder or reversion, enure in a different mode from this species of assurance. They may, according to circumstances, be grants, assignments, or surrenders, but they cannot have efficacy as releases,

2. Of the Want of Privity, because the Estate is assigned.

Respecting the capacity of assignees, it will be proper to observe, that after a particular tenant has assigned all his estate, he no longer has an interest which admits of

(*d*) Shep. Touch. 324.

enlargement. The release must be to the assignee, or it will be ineffectual. The same doctrine also applies to the reversioner; for if the reversioner part with all his estate, his assignee is alone competent to make an available release. This privity of estate must continue, till the release is made: therefore, if tenant for life, or in tail, *assign* all his estate, he is no longer capable of a release. To be effectual, the release must be made to the assignee (e). But when the tenant for life, or in tail, creates a particular estate, and retains a reversion, then the privity still continues between him and the person in remainder or reversion; and for that reason, the tenant for life, or in tail, may still be a releasee.

And wherever a release would be good, as from the donor, if he remained the owner; it will be good if made by his heirs or assigns, while they continue owners; and as to his assigns, whether they have the whole or only part of the estate.

So, whenever a release would have been good to a lessee or donee, before assignment, it will, after assignment, be good to his assignee. But it is observable that no one can be the assignee of the lessee or

(e) 1 Inst. 273.

donee, unless he hath all the estate; for if any *reversion* remain in the lessee or donee, there is not any assignee, and consequently the privity remains between the lessor and lessee, *donor* and donee, &c.

That an alienation (*f*) may deprive a tenant of his capacity to receive a release, he must have parted with all *his estate*. As often as he creates a derivative interest, and retains a reversion, he has, in point of law, his former estate, subject only to the estate of the under-lessee, and this derivative interest is not any impediment to his acceptance of a release.

The tenancy between him and the reversioner or remainder-man, still continues, and at the same time a new tenancy is created between the owner of the particular estate, and those who derive an interest out of his estate; and the last lessor (being the particular tenant) may release to his own tenant, by way of enlargement, or may accept a release by way of enlargement from the person who has a reversion or remainder expectant on his own estate.

(*f*) Dy. 4. Arg.
Shep. Touch. 326.

3. *Of Want of Privity, because there is not any Estate, but merely a Right or Interest.*

It is also necessary, as may be inferred from former observations, that the releasor should have a vested estate. A mere right or title of entry, or a contingent remainder, or an interest by executory devise, or an *interesse termini*, does not confer the right of granting an estate. Such an interest, when the person is ascertained, may be released by way of extinguishment of the right or interest; but a release by the owner of such interest, cannot have effect in the mode, in which the release in enlargement of estate must operate; that is, by *transferring* an actual estate.

It follows, that this assurance is not proper for persons having mere rights of entry or of action. That a release in enlargement of estate may be good, it must proceed from a person who has a *seisin*, to, or in favor of his *own tenant*, or of a person connected with him in privity of estate, consequently of a person who has a *vested* interest.

Therefore, if A. be tenant for life, remainder to B. for life, remainder to C. in fee, and A. be disseised, this in ordinary

cases, is a disseisin of those in remainder : and while the disseisin continues, no release of estate, to operate by way of enlargement, can be made with effect by B. to A., or by C. to either of them.

The utmost effect which a release between these parties can have, is to extinguish a reserved rent, or service, as already noticed.

So, if the disseisor make a lease for life, a release from the disseisee to the lessee for life, will not operate by enlargement ; for no estate remains in the disseisee. The proper assurance between these parties is a confirmation (g) of title ; and the release, it is assumed, may operate as such confirmation.

The observations which shew the difference between the union in one and the same person, of two terms of years, as distinguished from the union of a term, and an *interesse termini*, should be considered as relevant to this head.

And though it be true, that no interest, unless it confer a vested estate, can be enlarged by release ; and that an *interesse termini*, or a contingent remainder, or an interest, by way of executory devise, or springing or future use, cannot be enlarged by release, while the interest continues in

(g) Litt. s.

an executory state ; yet the moment the interest becomes vested, and confers an estate, the estate conferred by this interest will be capable of enlargement by release.

4. Of the Want of Privity, because the Estate is derived out of a mesne subsisting Estate.

From former observations it may be collected, that the creation of a derivative interest, by the particular tenant, will not disqualify that tenant to receive a release ; and that the creation of a particular estate by a reversioner or a remainder-man, will not incapacitate him, to enlarge the estate of the tenant in the original lease, or under the original particular estate. On the other hand, the reversioner or remainder-man, cannot by release, enlarge a particular estate, created out of another particular estate, as in the instance of a lessee who makes an under-lease (*h*). The estate of the under-lessee cannot be enlarged, at least while the particular estate shall be subsisting and interposed ; for the privity during that period will be between the lessee in the under-lease, and his lessor ; and not between the under-lessee and the person who hath the

(*h*) 1 Inst.

reversion or remainder, expectant on that interest, which *originally* was the particular estate.

Hence the observation of *Lord Coke*, that if A. make a lease to B. for life, and B. maketh a lease for years, and after, A. releaseth to the lessee for years, and his heirs, this release is void to enlarge the estate; because there is no privity between A. and the lessee for years.

And again, if a man make a lease for twenty years, and the lessee make a lease for ten years, if the first lessor doth release to the second lessee, viz. the lessee for ten years, and his heirs, this release is void, for the cause aforesaid. For the same cause, if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs, this release is void to enlarge the estate.

In *Sheppard's Touchstone* 233, the same point is applied to a release to the donee, after he hath made a lease for his own life; but with reference to the law as now settled, the latter point must be considered as untenable. It was in all probability grounded on the doctrine of *Littleton* (i) now

(i) Litt. s. 613. *Tooke v. Glasscock*, 1 Saunders's Rep. 250.
Seymour's case, 10 Rep. 96.
Machell v. Clarke, 2 Lord Raymond, 778.

exploded, that a grant by a tenant in tail of all his estate, was a grant only for his life.

A change of circumstances by merger, surrender, or forfeiture, in that estate which originally was the particular estate, may, it is apprehended, place the under-lessee in a situation to receive a release from the owner of the original reversion or remainder; but although there be no privity between an under-lessee, and the owner of the reversion or remainder expectant on the estate of the lessor of such under-lessee; yet if the reversioner or remainder-man makes a lease for life, or gift in tail, the lessee under such lease, or the donee under such gift, becomes the owner of the immediate reversion, and will be in a situation to enlarge the estate of the tenant of the original particular estate. Thus there will be an increase of interest in that relative connection of the tenants, which creates the necessary privities, and the following consequences will result: If A. lease to B. for life, and he under-leases to C.—B. may release to C., his own tenant, or A. may release to B., since B. is his tenant; but a release from A. to C., while tenant to B., will not be available. Again, suppose A. to lease to B., and afterwards to lease to C. for life, or to make a gift to him in tail, A. may release to B. or to C., for each of

them is his tenant; and C. as well as A. may release to B., for B. is immediate tenant to A. while C. is tenant to him under a remote interest. The most obvious case for enlargement, is a release from a lessor to his own lessee: and a bargain and sale, or lease for a year is adapted to these circumstances; for the lease for a year creates a particular estate, leaving an immediate reversion in the lessor; and by the release, that reversion is granted to the lessee, in enlargement of his estate, taken under the lease, or bargain and sale; and, as has already been shewn, the object of the lease for a year, with a view to its practical utility, is generally to *create* an estate which may be enlarged by release; and in many cases, as when the purchaser is already the owner of a particular estate, under an old term of years, to have certain and more modern evidence, by the creation of a new term, that there is an estate which may be a proper foundation for the release.

But when the owner of a particular estate creates an under-lease, either for years or for life, the privity of estate is between him and his tenant. The estate of his tenant may be enlarged by a release from him, but it cannot be enlarged by a release from the owner of the original reversion or remainder, while he has an estate expectant on the interest of that person by whom

this under-lease was made ; but as has already been observed, if A. be tenant for life, with remainder to B. in fee, and A. create an estate for years, or derivative estate for life to C., by way of under-lease, A. is still capable of a release from B. for the privity of estate still continues between them.

This privity also may be changed from A. to C., so that C. may be capable of a release ; and therefore, if the estate of C. be enlarged by release from A., the estate of C. may afterwards be enlarged by a release from B., for C. becomes the tenant of B., in consequence of receiving the estate of A. It was in this mode that a release was supported from A. and B. in favor of C., when A. was tenant for life, remainder to B. in fee, and A. granted to C. for years, and afterwards A. and B. joined in a release to C. (k); for this release operated first as the release of the tenant for life to his own tenant ; and secondly, as a release from the remainder-man or reversioner, to the under-lessee, thus become immediate tenant to the reversioner or remainder-man by the purchase of the estate of A. and the consequent merger, or rather consolidation of his own estate for years. By this operation, the privity between A. and C. ceased,

(k) Shep. Touch. 323.

and in an instant a new privity was created between C. and B., now bearing to each other the relation of lord and tenant, or tenant and reversioner or remainder-man. Let it be called to mind, that though the estate of A. may be merged or forfeited, so as to be extinguished in the estate of B., such merger, surrender, or extinguishment, will not give any right to B. to receive the *rent* from C., or take advantage of the covenants or conditions annexed to the estate of C. (l).

This has been said to be for want of privity: a better reason perhaps is, it is for want of a right to the identical reversion; for this right and the other benefits were annexed to a reversion which is extinguished. May not C. (m) surrender to B.? It should seem he may; and if he may surrender, there is not any well founded reason against his capacity of receiving a release from B., in enlargement of his estate. In short, the case in *Sheppard's Touchstone*, does in effect decide that there is a privity sufficient to support a release. And at the common law, the grant of B. after the merger, surrender, or extinguishment of the estate of A., would not, it is apprehended, have been good, without the attornment of C.

(l) *Webb v. Russell*, 3 Term Rep. 393, 681.

(m) After A.'s estate is merged.

While the estate of A. continued, and attornment was necessary, he was the proper person to attorn to the grant of B.; but when A. no longer retained the estate, the principles of tenure required that there should be the attornment of C. If this were so, there would be privity of estate between B. & C.; at least for some purposes, although there was the want of privity of contract. Therefore, though no authority for the point may be found, there seems good reason to suppose, that a release from B. to C. would be good after the impediment arising from the estate of A. was removed: and indeed the case in *Sheppard's Touchstone* seems a sufficient authority for this purpose.

The observations respecting rents, covenants, &c. must be understood of the common law. By a statute, remedy is given in certain cases, viz. statute 14 Geo. 2. c. 28: for rents against under-lessees, notwithstanding a surrender, and the acceptance of a new estate, for the purpose of *renewing their leases*.

4. *Of the Want of Privity, because the Estate is determined.*

4thly, For the sake of illustration of the general principles which govern this doc-

trine, and to preserve the order of arrangement, it may be observed, that the possession which a person formerly tenant for years has by *sufferance*, and who is, without much attention to technical accuracy, denominated a *tenant by sufferance*, cannot be enlarged by a release. The reason is obvious : he has a merenaked possession ; and no estate ; no privity. So after the determination of the interest of any other particular tenant, such quondam tenant has not any estate capable of enlargement.

Concluding Observations.

Whenever any difficulty arises in giving effect to an instrument as a release, for want of privity of estate, or for want of any prior estate, it will be proper to consider whether the instrument intended as a release, may not operate in some other mode, viz. as a surrender, appointment, grant, or covenant to stand seized, a confirmation, or a release of right. Whenever circumstances will admit of its operating in either of these modes, the decisions of modern times ; indeed the general rules of construction, and the principles of law ; justify the expectation that the operation of the instrument may be supported, in either of those modes, which ever will give effect to the general

or immediate object of the parties, to change the title from the intended releasor to the intended releasee.

The complex doctrine involved in the learning on releases, strongly enforces the prudence of adhering to the practice of making a lease for a year, as the foundation for a release, instead of relying, as is sometimes done, from motives of œconomy on a release to the assignee of a mortgage term, or some ancient estate, long since created ; so that the release could operate in that mode only, under the common law learning, applicable to releases, without the aid of those more simple rules, to which a lease and release, as parts of the same assurance, owe their origin and introduction into practice.

In practice, it should never be forgotten, that one of the great advantages of a lease for a year, as part of the same assurance with a release, is that the lease for a year, enables the releasee to give from his own title deeds, certain evidence that he had, at the date of the release, an estate capable of enlargement by release.

Of the Form of the Lease for a Year.

In order to a review of the form of the lease, it will be in course to consider,

- 1st, The date.
- 2dly, Who are the proper parties.
- 3dly, The consideration on which the lease must be grounded.
- 4thly, Who may be the grantor.
- 5thly, The formal words of grant.
- 6thly, Who may be the grantee.
- 7thly, Of what parcels there may be a bargain and sale, and the cautions to which attention must be paid in describing the parcels.
- 8thly, The habendum.
- 9thly, The reservation of rent.
- 10thly, The declaratory clause ; shewing the intention with which this assurance is made.

1. Of the Date.

The lease for a year is generally dated on the day next before the day of the date of the release. It is ordinarily also executed by each person, grantor in the lease, before the execution by that person of the indenture of release ground-

ed on the lease. This is the correct practice, and should be observed, as closely as circumstances will admit.

The material point is, that the lease for a year should give *a vested* estate, capable of enlargement, and be subsisting at least in legal intendment as a vested estate, prior to the execution of the deed of release. This is evident from all the preliminary observations, in which the nature and objects of this assurance have been considered.

Of course, no objection can arise from the circumstance that the lease for a year is dated at a more distant period than one day prior to the date of the release.

Sometimes, indeed, even in modern practice, there is an interval, in point of date, of a day between the day of the date of the lease, and the day of the date of the release, instead of having the lease and release dated on *successive* days. This happens from the caution of not dating *the* deed of lease or release on a Sunday. But a deed dated or even *executed* on a Sunday, is binding, and free from all well founded objection. The statute for the better observance of the Lord's day (*l*), applies to process and proceedings of the

(l) 29 Charles 2d, Ch. 7.

courts, and dealings in the course of *trade*, and not to the private transactions of individuals, as between themselves by way of conveyance; without the interposition of the courts (*m*), as is the case with fines and recoveries; transactions which are invalidated by the rules of the common law, when they appear to have taken place on a Sunday, which is considered as a *dies non juridicus* (*n*).

Sometimes also the lease and release are, from inadvertence, dated on the same day; and it has been decided, that the assurance is good, by giving priority to the lease for a year (*o*).

Supposing it should appear in evidence that the lease and release were both executed on the same day, but the release was *executed* before the lease for a year: it is highly probable, that even under these circumstances, the court would support a title derived under these instruments. The lease and release are parts of the same assurance; and the court might well decide, that the execution of the several instruments was to be considered as one entire

(*m*) *Drury v. Defontaine*, 1 Taunt. 131.

(*n*) *Wingate Maxims*, No.

(*o*) *Freeman*, 251.

Taylor v. Horde, 1 Burr. 106, 107.

transaction, and that the law gave priority, in its construction, to the execution of the lease for a year (*p*).

Many authorities may be found which afford a principle for such arrangement. Thus a lease, release, fine, and recovery, or a fine and declaration of uses, operating by way of *appointment*, are parts of the same assurance (*q*). In considering their effect, no regard is had to *the priority of date of one instrument before the other*. So a lease and release, considered separately, would operate simply as a rightful conveyance, yet taken in connection with a subsequent fine, forming part of the same assurance, and levied in pursuance of a covenant or agreement in the releases will operate by *discontinuance* (*r*).

In some cases there may be a mistake in dating the lease and release, by giving priority of date to the release, instead of the lease. Under these circumstances, the recital, in the release, of the lease, would in all probability be a foundation for averring the prior delivery of the lease for a year ;

(*p*) *Cromwell's Case*, 2 Rep. 74, b. 75.

(*q*) *Ferrers v. Fermer*, Cro. Jac. 643.

Selwyn v. Selwyn, 2 Bur. 1131.

Herring v. Brown, 2 Show. 185.

(*r*) *Doe on the demise of Odiarne v. Whitehead*, 2 Burr. 703.
as contrasted with *Seymour's case*, 10 Rep. 96.

thus making it a good and sufficient groundwork for the release, or the recital would be evidence of a separate, distinct, and antecedent release (*s*) ; and the rule of law admits, that a party may plead a deed, as dated on one day, and first delivered on another day (*t*).

For the date of a deed is not conclusive : on the contrary, the time of actual execution may be shewn either by the person who adduces the deed, or the person who resists or questions its operation. Thus in *Lord Say and Sele's case* (*u*) the time of the execution of a deed, declaring the uses of a fine, was shewn, with a view to impeach the validity of a recovery. The recovery, however, was supported by a fine, levied after the recovery was suffered, so as to have relation to a time antecedent to the recovery. Also the time of the execution of a lease may be shewn (*w*) to prove that the lease was delivered after the day of the

(*s*) Wightwick's Exch. Rep.

(*t*) *House v. Laxton*, Cro. Eliz. 890.

Stone v. Bale, 3 Lev. 348.

Comyn's Digest, Facts, B. 3.

Doe v. Day, 10 East. 427. in which the date expressed in the deed, was referred to for the purpose of construction, though it was delivered on a subsequent day.

(*u*) 10 Mod. 40.

(*w*) *East's Rep.* 427.

date, so as to be a lease of a present interest, and not a reversionary lease. Also the time of the execution of a deed may be shewn, to make out the fact, that the freehold was not granted *in futuro*, as the deed imports; but that the first delivery of the deed was after the time expressed for the commencement of the estate, so that the freehold passed immediately from the delivery of the deed.

Indeed, in *Parker v. Keate* (v), “North said, that when things are done in the same instant, they would transpose them and suppose a precedency; it being to support common assurances: and he also said, he had known it ruled several times, that a lease and release in the same deed, was a good conveyance, for priority should be supposed.”

Language to the same effect will be found in Cromwell’s case (w).

Of the Parties to the Lease for a Year.

2dly, All persons who are to convey any estate, and could not convey that estate at the common law without livery of seisin, must *necessarily* be lessors or grantors in the lease. This instance may be

(v) Freeman, 250.

(w) 2 Rep. 74, 75.

understood, as that alone in which there is any absolute occasion for a lease for a year from conveying parties, since under any other circumstance, the intended conveyance may operate as a grant.

It is equally necessary that the person or persons to whom the release is to be made, should be the lessees in that part of the assurance now under consideration.

The very foundation of the release is the lease ; and as it has been already observed, the lease is used merely to supersede the necessity of livery of seisin, in short, to create an estate, capable of enlargement, instead of passing the freehold immediately by livery of seisin.

In strictness, therefore, the omission in the lease of those persons, who might transfer their estate by grant, without livery of seisin, is not so material as to raise an objection to a title ; for the release may operate as a grant, though it cannot be effectual as a release ; and it may as to some persons, operate as a release, and as to others as a grant. And it should seem that in all conveyances by persons who are merely *cestuis que trust*, the lease for a year is not essentially necessary as part of their assurance, since at the common law, they could not have conveyed by livery of seisin ; and since also any instrument which expresses an intention to transfer the

beneficial ownership from one person to another, is effective in a court of equity (x). But from caution, it is the uniform practice of conveyancers to make the *cestuis que trust*, and all persons who are to join in the release as conveying parties, lessors in the lease. And by a gentleman, whose experience entitles his opinion to the utmost respect, a doubt has been expressed whether a conveyance can be made, by a *cestui que trust*, without a lease and release, if under similar circumstances, a lease and release would be requisite to convey the legal estate. This doubt is evidently founded on a rule to be found in the Reports, that equitable estates are to be conveyed in the same manner, &c. as legal estates. The rule, however, can never be reasonably carried to the extent of requiring a feoffment, a lease and release, or inrolment as part of a bargain and sale. Courts of equity look to the substance, rather than the form: and the intention to convey, clearly manifested by the language of the deed, is the substance, while the *mode* of conveyance is merely *form*. Courts of law relax as much as possible from the strict rules which require

(x) Francis's Maxims, 53. "Equity regards not the circumstance, but the substance of the act."

Brydges v. Brydges, 3 Ves. jun. 120.

particular forms to be observed. On an equitable interest, the deed operates as a conveyance of a different nature. It is merely on account of principles of tenure, and to comply with the established rules of law depending on reasons which no longer exist, that livery is essential to a feoffment, that a bargain and sale shall be enrolled ; and that the freehold in possession of lands shall not pass merely by a grant, without first creating a particular estate to be enlarged by the grant. Trust estates are not within the influence of these rules, nor do they in any view, governed by principle, require the application of these rules. And it seems to be carrying the analogy too far, to require that the identical mode of assurance, proper for passing a legal estate in lands, should be observed in passing the equitable interest in the lands. Besides, when the court is in the habit every day of deciding that an irregular and informal instrument, even a mere contract for sale, will change the equity from one person to another, so as to convert the owner of the legal estate, into a trustee for a person who by these means becomes beneficially interested ; it is too much to conclude that the court would deny to a formal instrument of grant, the operation of changing the equitable interest of one person, from him into another person, according to

the intention expressed in the instrument? And whoever traces the decisions of courts of equity, it is apprehended, will find sufficient reason to be satisfied that the equitable estate may be changed from one person to another by *mere grant*, without those ceremonies of livery, inrolment, a lease to precede a release, which are founded on principles of tenure.

It is a rule of courts of equity, that the fee may, when the intention requires it, pass, without a limitation to the heirs; and if these courts dispense with words of express limitation, so essential to the extended operation of a conveyance at the common law, what reason is there for a strict adherence to those rules of law which require a particular mode of assurance, on grounds peculiar to legal estates, and to the laws of tenure, by which the mode of conveying these estates is regulated? It should seem then safe to conclude, in regard to the conveyance of equitable interests, that a lease for a year is used from analogy, rather than principle, or necessity; and that any interest merely equitable, as it may pass without livery of seisin, may pass by a single deed, operating in the nature of a grant, and without inrolment or other external ceremony.

Persons who are merely to release a right or title, or collateral charge, even

at law, are never, merely on that account, made parties to the lease, when it is prepared with due attention to form. At the same time it is safer to make such persons parties, especially in doubtful cases, than to omit them: and in taking a release from an heir at law, in confirmation of the title of a devisee, or to supersede the necessity of proving the will; and also when former owners become parties to release some charge or incumbrance, or to afford evidence of earlier transactions; it is, in all cases, advisable to have the conveyance by lease and release, rather than a simple release of right, or a confirmation.

Under this head it is also to be called to mind, that it is of the essence of the assurance by lease and release, that the grantor in the lease for a year, when it is to operate by way of bargain and sale, through the medium of the Statute of Uses, should be a person who may stand seised to an use: hence, it is necessary that the grantor should have a seisin of the inheritance, or at least of the freehold: for an use, or a trust of a term for years, will not be executed by the statute of 27 *Hen.* 8. The statute is confined, in its operation, to those who have a seisin. It has also been said that though a corporation may give a use, yet a corporation cannot stand seised to a

use (y): an absurd distinction; a distinction in words, rather than substance. Thus a bargain and sale in fee from a corporation, has been supported, because a corporation may give a use (z). It has always been doubted, whether a bargain and sale for years, from a corporation, would give a vested estate by force of the statute of uses; and hence the practice even at this day, is for corporations to convey by feoffment, or by lease, at the common law, to be perfected by entry, and a release grounded on the lease for a year, made after the completion of the lease by entry.

The general rule is, that all persons, who have a seisin of an estate of inheritance or of freehold, even without the exception of tenants in tail, may stand seised to an use. It will be sufficient then in this place to refer to the observations which may be found in other parts of this work (a); for the persons who may not stand seised to an use, and for a more enlarged and a detailed discussion of the ground on which the disability arises.

(y) See Holland and Bain's case, 2 Leonard, 121, 122.

(z) 2 Leonard, 121.

(a) See p. 246, 252, 258, 264, 265, 267.

Of the Consideration.

3dly, As to the consideration of the lease for a year.

To every bargain and sale, it is essential that there should be a valuable consideration (b); it may be either money or money's worth (c); it is not by any means necessary, as it has been sometimes stated, that there should be a pecuniary consideration (d).

A horse, a rent reserved, &c. are valuable considerations, and will raise the use on a bargain and sale—hence the *reddendum* of a pepper-corn in the bargain and sale will in the absence of a pecuniary consideration, be sufficient to answer this requisite (e); but friendship, affection, or the like, is not a consideration to raise a use (f).

To avoid confusion and any wrong con-

(b) 1st Resolution in Mildmay's case, 1 Rep. 176 a.
2 Institute, 672.

(c) 1st Resolution in Mildmay's case.
1st Resolution in Wiseman's case, 2 Rep. 15 a.
Sheppard's Touchstone, 511.

(d) Gilbert on Uses, 47, 58,
2 Black. Com.

4 Cruise Dig. 178,
Saunders on Uses, 53.

(e) Barker v. Keate, 2 Modern Reports, 253,
1 Freem. 249.

(f) Shep. Touch. 511.
Gilbert on Uses, 48, 253.

clusion from authorities, it is to be observed, that although the creation of a particular estate, or of a tenure, implies a consideration, and will prevent an use from resulting by implication of law ; yet a mere bargain and sale for a year, or any other particular estate, will not raise or create an use in the absence of a consideration in money or money's worth : so that the difference is, that in one case, no use arises ; in the other case, as the estate is already created or vested, the use will not result (g).

Of the Grantor.

4thly, Who may be the grantor.

1. In point of estate.

2. In other respects.

This subject has in effect been already discussed. And from the former observations, it will be collected that the grantor must have a vested estate. Such estate may be either in possession, reversion, or remainder. On the other hand, it will not be sufficient that the grantor should have

(g) Broke Feoffment al. Uses, 10.
Perkins, s. 534, 535, 536, 537.
2 Freem. 249.
Dyer, 146 b.

merely a contingent or executory interest ; either under a contingent remainder, or executory devise ; or a right or title of entry, or a mere possibility ; or a mere chance or hope of succession, as is the case of an heir in the life-time of his ancestor.

2dly, It is necessary also that the grantor should be able to grant, so as to be exempt from the disqualifications of infancy, coverture, alienation of mind, insanity, &c. ; and that a lease for a year may operate as a bargain and sale under the statute of use,^s it is necessary that the grantor should be capable of standing seised to an use. On all these subjects, more detailed observations have been made, in considering who may be the releasor, in point of estate, &c. These observations are now introduced, rather with a view to the operation of the lease for a year, as a bargain and sale, than as relevant to the release as a common law assurance.

In adverting to infancy, and its consequent inability, the case of *Zouch v. Parsons* (i) has not been forgotten. It would be well for every lawyer that such a decision had never existed to be remembered. It is a solitary case: its authority has

(i) 3 Burr. 1794.
17 Ves. jun. 384.

frequently been questioned, by that sound lawyer, the present chancellor: and it would be a singular surprise on any well read lawyer, that a case should be found, that a grant by deed from an infant should (when a deed is essential to the assurance, and the efficient means of passing the estate) have any effect whatever. All the books make the distinction, between a feoffment, or other instrument operating by reason of livery, entry, &c. and those assurances which (like a release in enlargement of estate) operate by grant. Upon what principle is it that a feoffment by an infant in person is voidable only, while a feoffment by an infant, through the medium of an attorney, is actually void? The well-known ground is, that an attorney cannot be appointed without deed; that the deed of an infant is, with very few exceptions, void; and, as a consequence, the letter of attorney, and the feoffment grounded on the same, are actually void, and not merely voidable. No one, therefore, will ever, in practice, treat a lease and release by an infant as an assurance, on which any reliance can be placed.

5thly. Of the Words of Grant.

When a lease is made for a valuable consideration, any words are sufficient to enti-

the lessee to plead the instrument as a bargain and sale. Though the words "grant, demise, and to farm let," or any of them, or any other words of the like import, commonly used in demises at the common law, are the operative words of a grant, the lessee has the election of pleading this lease as a demise at the common law, or as a bargain and sale (a). It was clearly agreed by the court that the words "give for money," "grant for money," "confirm for money," "agree for money," "covenant for money," if the deed be duly enrolled, the lands pass both by the statute of uses, and by the statute of inrollments, as well as upon the words of bargain and sale (b). But the most appropriate words to be used in the lease, are the words "bargain and sell."

6thly. Of the Grantee.

Who may be the bargainee. It will be sufficient, that the person to whom the bargain and sale, or lease for a year, shall be made, should be a person capable of being a grantee, in ordinary cases, and, with a view to this particular case, capable of receiving an use. Generally speaking, every person is

(a) Sir Rowland Heyward's Case, 2 Rep. 35. Third Resolution, Earr's Case, 8 Rep. 94. Bedel's Case, 7 Rep. 40.

(b) 3 Leonard, 16.

capable of being a grantee. A monster is not capable : this instance, however, cannot be considered as an exception, since a monster is not a person. The other exception is a man professed in religion : but at this day there cannot be any profession (*a*). The cases of a community not incorporated as the parishioners or inhabitants of D. or the commoners upon such a waste, or churchwardens, are also noticed by *Lord Coke* as exceptions (*b*) ; but these are rather instances, that such persons have no capacity in this right, or in this character. They are capable as individuals, though the law will not allow them to be grantees in a character, in which they cannot have an estate, by perpetual succession. It is also to be noticed, that in the city of London, by usage in some cases, the parson and churchwardens, (*c*) and in other places by act of parliament, (*d*) the churchwardens have a corporate capacity, for some purposes at least : and by various acts of parliament of modern times, persons who are not strictly corporations, have a corporate capacity, enabling them to do certain acts. All persons, even corporations, and the

(*a*) Co. Litt. 3 b. 132 b.

(*b*) Co. Litt. 8 a.

(*c*) Cro. Jac. 532.

(*d*) Stat. 9 Geo. 1. c. 7.

king, who are capable of an use, may be grantees, for their own benefit (a).

And even an *alien* may be a *cestui que use*, subject to the right of the crown to take the benefit of the use (b); but whoever was incapable of an estate, as a monk, being *civiliter mortuus*, was equally and for the same reason incapable of an use (c).

The bargainee in the lease for a year, should be the person who is to be releasee in the release. Of course, when there are to be several releases, these several persons should be bargainees. Sometimes by mistake, one person is made bargainee, and another person is named as the releasee. Under these circumstances, the release can operate only as a substantive independent grant. The bargainee may be considered as having an estate for a year, and hence the intended release may be operative, as a grant to a stranger of the reversion expectant on that term. Thus the lease for a year will be useful; not as part of an assurance by lease and release; but as creating a particular estate, and of consequence, leaving a reversion in the lessor which may pass by grant.

Suppose the transaction to be perplexed

(a) Sand. on Uses, 66.

(b) Holland's Case, Alleyn, 16. Gilb. on Uses, 43. and See 1 Sand. 66.

(c) Gilb. on Uses, 44.

by a grant to one person with an *habendum*; to another person; under such circumstances, it may be supposed, the grant ought to prevail against the *Habendum*. But from a late case (a), it is to be collected, that the courts will modify, in construction, the different parts of the assurance, so as to carry the intentions of the parties into effect, as far as that can be done, consistently with the rules of law. In the case under consideration, a lease for a year was made to B. and by an indenture dated on the following day, in consideration of the purchase money paid by C. and by his direction, a grant and release were made to C. in fee; *habendum* to B. to uses for the benefit of C. The title was objected to as defective on account of the repugnancy in the deed of release. But the court decided, that in construing the conveyance, the grant which was repugnant to the *habendum*, should be rejected as surplusage, and the *habendum* and limitation of uses be supported.

7thly. Of the Parcels.

The lease should include all the parcels intended to be comprised in the release,

(a) *Spyve v. Topham*, 3 East 115.

for unless the parcels are granted, and consequently described in the lease, either in terms or in effect, there will not, as to the omitted parcels, be any estate to be enlarged by the release.

It follows, that when there is any omission of parcels in the lease, the assurance cannot, as to the omitted parcels, operate as a lease and release, and therefore, as to the omitted parcels, it will be void, unless the intended release can operate in some other mode: and in this place, it is to be remembered, that every release is and may operate as a grant; but every grant is not necessarily a release, or operative as such.

When parcels are to be conveyed in the release by a full description, or even by general words, the same description, or one to the same effect, should be introduced into the lease: and when the parcels are in the release, to be granted by words of reference to a schedule, except such schedule is merely for identity, a similar schedule, as an accumulative description, should be added to the lease, or the parcels in the schedule should in that case be transcribed, as the parcels in the lease. When the parcels are granted in the release by words of reference to a more full description, contained in a recital, the parcels in the lease should be taken from the deed so recited,

or at least so many of them should be taken as are to be conveyed by the release.

When the parcels are long, or the description of them is rendered complicated by words of reference, it will frequently be found convenient, and, in point of expence, highly prudent, to have the lease indorsed on the release, and to describe the parcels by means of a reference to the release. The description may be in these words, or to this effect:—"All those manors, &c. which
" are mentioned or described in the within
" written indenture or instrument; being
" the hereditaments expressed and intended to be, thereby released or otherwise
" assured unto the said , as in the
" same indenture or instrument is particularly mentioned; and every part, &c.
" with their and every of their rights,
" royalties, members and appurtenances." That such description would be sufficient, is a point on which no doubt can reasonably be entertained. In a transaction of considerable magnitude, a doubt was expressed, whether a reference could be made from one instrument to another instrument, to be executed at a subsequent period. This objection is not sufficiently precise to be intelligible. The force of the objection must, it should seem, arise from the terms or language of the instrument, and the want of certainty or identity. It is true, that by a

will, no reference can be made, so as to embody into the will an instrument not in existence at the date of the will: since to allow of the adoption of a future instrument, would be to take away the protection of the statute of frauds and perjuries. This subject was amply discussed in the late case of *Wilkinson v. Adam and others* (k). But reference may be made with effect, from a will to an instrument which is previously in existence (l), or to an instrument which though executed is merely *in fieri*, as a will of another person who is living. And in the case of a lease indorsed on a release already prepared, the lease does not refer to an instrument which is not in existence. The writing exists, though it does not exist as a perfect, complete, and executed instrument. On the other hand, the reference is not to the instrument as executed, but to an instrument to be executed. Is it not common and allowable by the rules of law, to enter into a bond or covenant to execute certain indentures already prepared, &c.? In the particular instance, and to obviate this objection, though its force was not felt, the parcels were taken in the lease for a year, by general words uncon-

(k) 1 Ves. and Beames, 423.

(l) *Molyneux v. Molyneux*, Cro. Jac. 144. *Habergham v. Vincent*, 2 Ves. jun. 204. *Bond v. Seawell*, 3 Barr. 1775. *Metlam v. Duke of Devonshire*, 1 P. W. 529.

nected with, and independent of the description in the release.

Nothing is more common in practice, than to refer, by general terms, to a description in a former deed, and no doubt is entertained of the sufficiency of such descriptive terms. The rule is, "*certum est quod certum reddi potest.*" Another rule is, "*Verba relata hoc maxime operantur, quod inesse videntur.*" In the form which has been given, the reference is not to the lands thereby released, so as to afford scope to the technical objection, that the lands are not released, but the reference is to the lands mentioned or described in that indenture, and as the lands are mentioned and described in that indenture, there is all the certainty which the law requires. But there is a difficulty arising from the *stamp* laws, whether reference can be made from one instrument to another, not having at that time any operative force. Even this point does not seem to be against the right to make such reference. If there be particulars of sale, it is allowable for a deed or a contract to refer to such particulars of sale, as containing the certainty of the parcels; and if there may be a reference from a deed or a contract to a particular of sale, there is not any well founded reason against a reference to parcels described in a release, intended to be executed as part of the same

assurance, with the lease for a year. The prudent course is to avoid these and similar questions of so much nicety: this may be done with great ease by adopting such general terms of description, as will certainly comprise all the lands to be included in the release.

To the parcels of the lease, the general words should, in all cases, except those of a lease by indorsement, be added; and if there be any sweeping clause, viz. general words of "all messuages, &c." these, or the substance of them, should be included in the lease.

The clause of the reversion is generally added: it is a *formal* not a *necessary* part of this instrument. The clause of all the estate, should uniformly be omitted. This clause is proper in those instruments only which pass all the estate of the grantor, and is informal in instruments creating a particular estate, but, though inserted, the operation of the instrument will be qualified and restrained according to the intention apparent on the instrument (m).

In modern practice the habendum is generally made for one year. Hence this part of the assurance is usually denominated the lease or bargain and sale for a

(m) *Plowden v. Cartwright*, 1 Burrow, 282. the *Earl of Derby v. Taylor*, 1 East, 602; and see p. 166 of this volume.

year. It is, however, immaterial whether the grant be for a year, or for any longer or shorter period. The only caution to be regarded, is to limit the term, so that the same may be an actual, vested, and continuing estate, capable of enlargement at the execution of the release, and not merely a future interest, or an *interesse termini*.

With a view to this caution, the lease is generally made, to hold *from the day next before the day of the date*, and it will be proper to adhere to this form. But even though the habendum were to hold henceforth, from the date, making, &c. the lease would immediately, on the execution thereof, give an estate, capable of enlargement; and this is the object to be attained. For a corresponding reason, the release is generally dated on the day next after the day of the date of the lease.

But there are grounds to contend, and the point has already been noticed, that even though the lease and release should be both dated *on the same day*, they might operate as an effectual conveyance, since immediately after the execution of the lease, the lessee would have an estate capable of enlargement: and though for a variety of purposes, a day is considered as one indivisible point of time, and in the language of the law, applied to some cases, there is no fraction of a day; yet for other purposes, there

is a priority, even in an instant of time (n). But if the lease and release should both be dated on the same day, and the lease should be made to hold from the day of the date, which, according to the old cases, excluded the day of the date (o), there would formerly have been great difficulty in supporting the operation of the release as a release for want of a previous estate, capable of enlargement. Modern cases, which construe the terms, from the day of the date, as exclusive or inclusive of the date, as the intention may require, would in all probability be deemed authorities to relieve a title from any difficulty on account of this informality.

In these, and all other like instances, it is proper to conform to the established practice, for the purpose of avoiding the doubts of those, who judge more from the experience they have acquired, in a fixed and determined course of practice, than from any knowledge of first principles, or who, if acquainted with first principles, are too timid to act on their authority.

As to the Reservation.

The reservation of rent is a formal and not an essential part of a lease for a year,

(n) Sir Robert Howard's Case, 2 Salkeld, 625.

Ex parte Dobree, 8 Ves, Jun. 82.

(o) Powell on Powers, 472.

Pugh v. the Duke of Leeds, Cowper, 714.

provided there be a consideration of money, or of money's worth. This clause was introduced into general practice in consequence of the determination in *Barker v. Keate* (p), that a lease made with a reservation of a rent, was, in respect of the rent, a lease for a valuable consideration, and might be used as a bargain and sale.

It follows that when there is an express or valuable consideration in the testatum part of the deed, the omission of the reddendum, or clause reserving the rent, affords no objection against the validity of the assurance as a bargain and sale.

When a rent is reserved, it should be to the bargainors of the legal estate, especially when legal and equitable owners join in the bargain and sale; or it is still preferable that the rent should be reserved generally during the term, since the law will appropriate the rent to the person to whom it ought to have been reserved (q). However, though the reddendum should be to a stranger or to a person not seised of the legal estate, still the reservation to be paid in the name of rent would be, it should seem, a sufficient consideration to support the deed as a bargain and sale, since the payment of a considera-

(p) 2 Mod. 249.

(q) Whitlock's Case, 8 Rep. 69. b.

tion to a stranger will support a bargain and sale from the owner.

The rent generally reserved is a peppercorn; but it may be a grain of wheat, or the like.

Of the Declaratory Clause.

The declaratory clause, expressing the intention with which the lease is made, is also a formal and not an essential part of the assurance. Of course the omission of it would not invalidate the instrument, while a due observance of practice will suggest the propriety of its insertion.

This clause is declaratory of the motive or purpose for which the lease for a year is made. It generally runs in these terms:—

“To the intent and purpose that by
“virtue of these presents, and of the statute
“for transferring uses into possession the
“said A.B. may be in the actual possession
“of the premises, and be thereby enabled to
“take and accept a grant and release of the
“freehold, reversion and inheritance of the
“same premises to him, his heirs and as-
“signs for ever, to the only proper use and
“behoof of himself, his heirs and assigns
“for ever, by an indenture already prepared,
“and intended to bear date the day next
“after the day of the date of these presents,

“ and to be made between, &c.” or, in this form :

“ To the intent that by virtue, &c.”
(*as before*). “ the said A. B. and C. D. may be
“ in the actual possession of the pre-
“ mises, and be thereby enabled to accept a
“ grant and release, &c. (*as before*), to the
“ uses, upon the trusts, and for the intents
“ and purposes to be declared by an indenture
“ already prepared, and intended to bear date,
“ &c. and to be made, &c.”

This clause calls for one observation, it follows the language of practice, in assuming the object to be, to put the lessee in the actual possession. This expression, and the practice on which it is grounded, must be understood as a reference to the operation of the statute for transferring uses into possession. By possession, is meant only estate. The lease for a year, or bargain and sale, cannot, by its own operation, give to the lessee or bargainee the actual possession. It accomplishes nothing more than to give him an actual estate. This may be an estate entitling the lessee or bargainee to the right of immediate possession, or to an estate conferring a remainder or reversion expectant on some estate previously subsisting, or it may from its language give a future executory interest. Though the bargain and sale may be by a person who has the possession, the possession will not

be changed without an entry by the lessee or bargainee, even when the bargain and sale is to be from a day which is past, or henceforth, &c. &c. At the common law the lessee had not any estate till entry: under the bargain and sale he has an estate immediately on the execution of the bargain and sale, and before entry, provided the bargain and sale is to hold from a day past, or from the execution. But the bargainee cannot maintain an action of trespass, or be considered as in the actual possession *of the land*, until he has entered by virtue of the bargain and sale (*b*).

With every disposition to encourage an observance of established forms, it is to be lamented that any expression should have been adopted for this or any other instrument which might lead the student to an inaccurate conception of the true meaning of the expressions which are used. Some other expression, shewing that the lessee was to have *an actual vested* estate, as contradistinguished from an actual possession, would have more adequately described the object of the lease for a year, and possibly might have been a protection against those errors into which not only students, but even men of extensive knowledge in the profession, who have un-

(*b*) *Barker v. Keate*, 2 Med. Rep. 251.

dertaken to write on the subject of this assurance, have been led:—how just is the maxim, *ignoratis terminis, ignoratur et ars*, and the other maxim, *nomina si perdas certe distinctio rerum perditur*.

Of the Lease and Release.

It will now be proper to treat of the parties to a release, and the formal parts of this assurance.

As a deed is of the essence of a release, it follows, that no one except those who can grant by deed can effectually grant by a release, and that the release must be made by deed.

It frequently happens that the release forms one only of the assurances contained in a deed. The deed may have other objects besides the release, consequently other parties besides the releasor may be necessary to give effect to these objects: as far as respects the release itself, it will be sufficient that the intended releasor and releasee should be parties.

The formal parts of the deed, independent of other circumstances, are

- 1st. The date.
- 2dly. The clause which names the parties,
- 3dly. The testatum clause.
- 4thly. The recital of the lease, or bargain and sale for a year.

- 5thly. The parcels and exception.
- 6thly. The habendum.
- 7thly. The declaration of use.
- 8thly. Sometimes the declaration of trust.
- 9thly. The covenants.

1st. Of the Date.

In modern practice, the lease and release, as has already been observed, are parts of the same assurance. The release is generally dated on the day next after the day of the date of the lease for a year: this order of date is not absolutely necessary. On that point some observations have been offered in considering the circumstances, which, in regard to the date, are to be observed in the lease for a year. From the authorities which have been cited, it is also obvious that the release may be a transaction totally independent of a lease for a year, prepared for the purpose of being a foundation for the release. An estate for years or life, though created at any period however remote, and without any view to an enlargement of the estate of the lessee or bargainee, is equally capable of enlargement as if the estate had been created, as is the case in modern practice, immediately before the release, for the sole purpose of being enlarged.

2dly. *The Clause which names the Parties.*

Of the parties some notice has already been taken. It remains only to be added, that care should be taken to designate with sufficient certainty, the persons who are to be parties.

The general rule to be remembered in this place is, that no one can grant by a deed, or take an immediate estate under the deed, unless he be a party to the deed (c). But a person may take a remainder (d), or an use (e), or the benefit of a trust under a deed, without being a party to it. In a deed poll (f), a person becomes a party merely from the circumstance of being named as the person by whom, or to whom the grant is made. With reference to *indentures* between parties, it seems to be a general rule, that no one can be considered as a party to a deed, unless he be named as a party in the clause, containing the names of the persons who are formally made parties. Thus, in the instance of an indenture, expressed to be made between A. of the one part, and B. of the other part, C. could not take an *immediate estate*, or be a grantor or a grantee, or a co-

(c) Co. Litt. 231. a.

(d) Ib.

(e) *Samms's Case*, 13 Rep. 55.

(f) 1 Inst. 526.

venantor or covenantee, because he was not named among the parties. That a remainder may be good to a person who is not a party to a deed, is the express language of *Lord Coke*, and of all the authorities. The proposition of *Lord Coke*(g), confirmed as it will be by several passages from other authors, is

“ And albeit, he in the remainder be no
“ *party* to the indenture (the parties there-
“ unto only being the lessors and the te-
“ nants for life,) yet when he in remainder
“ entereth and agreeth to have the lands by
“ force of the indenture, he is bound to
“ perform the conditions, contained in the
“ indenture: and here is also a diversity
“ to be understood, that any stranger to
“ the indenture may take by way of re-
“ mainder, but he cannot in this case take
“ any present estate in possession, because
“ he is a stranger to the deed.”

The cases applicable to this division involve minute distinctions and technical niceties; and it will be proper to observe, that there are three classes of deeds:—

1st, Indentures introducing the *actores fabulæ*, as parties, in this form, or to this effect,

“This indenture, made, &c. between A. B.

(g) 1 Inst. 230.

" of the one part, and C. D. on the other part."

2dly, Deeds indented, and which without naming any person as parties, begin with these or the like terms :

"It is agreed, &c. that, &c." without naming any person as parties to the agreement ; merely bringing different persons to act in different characters, as circumstances and their interest, or the intention may require.

3dly, Deeds poll, which commence with words to this, or the like effect :—

" To all *Christian* people, or to all persons to whom these presents shall come or be shewn, A. B. &c. sendeth greeting ; or know ye that A. B. &c. hath, &c."

These different classes of deeds give occasion to different conclusions. First, when an indenture is made between parties, the general rule that no one can take as an immediate grantee under a deed, or be a grantor, covenantor, or covenantee, unless he be named as one of the parties in the deed, is true. This rule is to be collected from *Lord Coke*, in the *2d Inst.* 673. who states this case :—

" In action of debt between *Scudamore*, and others, plaintiffs, and *Vandenstene*, defendant, upon an indenture of charter-party, the case was thus : The indenture of charter-party was made between *Scudamore* and others, owners of the good ship called B.

“whereof *Robert Pitman* was master on the
“one party, and *Vandenstene* on the other party.
“In which indenture, the plaintiff did cove-
“nant with the said *Vandenstene* and *Robert*
“*Pitman*, and also *Vandenstene* covenanted
“with the plaintiff and *Robert Pitman*, and
“bound themselves to the plaintiff and
“*Robert Pitman* for the performance of cove-
“nants in six hundred pounds; and the con-
“clusion of the said indenture was, ‘In wit-
“ness whereof the said parties abovesaid
“to these present indentures have put
“their seals’—and the said *Robert Pitman*
“to the said indenture put his hand and
“seal, and delivered the same. The defen-
“dant in bar of the said action pleaded the
“release of *Pitman*, &c. whereupon the plain-
“tiff demurred, and it was adjudged, that
“the release of *Pitman* did not bar the plain-
“tiff, because he was no party to the inden-
“ture—and the diversity was taken and
“agreed between an indenture reciprocal be-
“tween parties on the one side, and parties
“on the other side, as this was; for there no
“bond, covenant, or grant can be made to
“or with any that is not a party to the deed.
“But where the deed indented is not recipro-
“cal, but is without a between, &c. as *omni-*
“*bus Christi fidelibus*, &c. there a bond, cove-
“nant, or grant, may be made to divers sever-
“al persons.”

The same case is reported by the name

of *East, Skidmore, and Froame v. Vandstev-*
ven, by *Croke* (h), thus, "Covenant for not
" performing certain conditions in an in-
" denture between the plaintiffs, master of
" the good ship of A, of which *Robert Pit-*
" *man* was owner of the one part, and the
" defendant on the other part, and the con-
" clusion of the indenture was, *in cujus rei*
" *testimonium*, the parties aforesaid to these
" presents have set their hands and seals, and
" all the plaintiffs, and the said *Robert Pit-*
" *man*, set their seals to one part; and the
" defendant to the other part; and in the
" indenture there were divers covenants to
" be performed by the plaintiffs, and by
" the said *Robert Pitman* to the defendant,
" and *è converso*; and there was a clause in
" the indenture that the plaintiffs and the
" said *Robert Pitman* bound themselves to
" the defendant to perform the covenants;
" the defendant pleads that the indenture
" was delivered to the plaintiffs, and the
" said *Thomas Pitman* (and so mistakes
" *Thomas* for *Robert*) pleads the release of
" the said *Thomas* of all covenants; and
" thereupon the plaintiffs demurred for two
" causes.

" 1st, The release was pleaded by T. P.,
" whereas no such man was named in the

(h) Cro. Eliz. 56.

" indenture, and this was held a great mistake and without defence ; and the roll was commanded to be searched.

" 2d, And the chief matter was, admitting the name had been right pleaded, and that *Robert Pitman* had released, if this release was good. *Coke* argued that forasmuch that only the plaintiffs in the premises of the indenture were parties of the one part, and the defendant of the other, although *Robert Pitman* is afterwards named in the deed, it is a void deed as to him, and no covenant made to him or by him is good, for he is a stranger to it, and his sealing and delivery is not material ; as if *I. S.* by indenture between him of the one part, and *I. D.* of the other, demiseth lands to *I. D.* and *A. B.*, it is void to *A. B.* ; and he answered the case as put by *Godfrey* of the other side, 4 *Edw. 2.* obligation ; (an obligation was made by *I. S.* and *ad majorem rei securitatem inveni I. D. fide jussorem*, and *I. D.* put his seal to it : this was his deed.) Which case he agreed : for it is not mentioned whose deed it is ; and so it is the deed of both, which are named and put their seals, &c. So when an incumbent grants a rent by the assent of patron and ordinary, and they put their seals to it, this is not their deed, but only their agreement to it. And the case of 39 *Edw. 3.* c. 9. is upon the same reason of 4 *Edw.*

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“ Upon evidence, a
“ that an indenture of fee is wife,
“ of attorney in it, is not good to the
“ ger to make livery. But other and
“ deed-poll, because in that twenty he
“ may be made parties one after another.
“ But in an indenture, those between whom
“ it is made, only are parties to it. But
“ by the court that it is good enough, and
“ that it is a common case and a common
“ use.”

This decision or opinion, so far from
ruling the general doctrine, treats a case ap-
pointing an attorney as an exception to
the general rule. That rule is illustrat-
ed and even proved by the cases to be
now introduced.

In *Windsmore*, lessee of *Edward Long*,
plaintiff, v. *Nicholas Hobart* (l), defendant,

(k) Noy, 49.

(l) Hob. 313.

an ejectment was brought for land in *Polsholt*, in the county of *Wilts*; and it was found by special verdict that *William Lord Sturton* was seised in fee, and that 24 Maii 8 Hen. 8. by his certain writing indented, sealed with his seal, he granted to one *Thomas Hobart*, the tenements aforesaid, to hold to the said *Thomas*, and to the aforesaid *Nicholas Hobart*, and to *John Hobart*, and *Henry Hobart*, the sons of the aforesaid *Henry* for their lives, and the life of the survivor of them successively; the said *William Lord Sturton* granted the reversion to *Thomas Long*, and his heirs, who devised the reversion to *Edward Long*, the lessor, in tail, and died; *Thomas Hobart* and *Henry Hobart* died, and *Nicholas* and *John* survived, and the lessor entered, and made the lease to the plaintiff, and the defendant entered.

And in this case judgment was given for the plaintiff after long debate, and upon great consideration, whereof the reasons were; first, that none could take by the deed immediately, but *Thomas Hobart*, because he was only party to the deed, and the rest not named but by the *habendum*, then they cannot take but by the way of remainder, which cannot be joint, because of the words *successive*, &c. And in succession they cannot take for the uncertainty who shall begin, and who shall follow,

which in the case, 20 *El. Dyer*, is ascertained by the clause *successive, sicut nominantur in charta*.

Again, in *Greenwood v. Tyler (m)*, *Anthony Long*, and *Alice* his wife, were seised in fee, in right of *Alice*, of the tenements in which, &c. and being thus seised, on the 20th August, anno 2 *Ed. 6.* an indenture was made between the said *Anthony Long*, and *Alice* his wife, of the one part, and one *John Fisher* of the other, and thereby the said *Anthony Long* and *Alice* his wife, demised and to farm let by indenture to the said *John Fisher* and *Anne* his wife, and *Johanna* their daughter, the tenements in the count mentioned: To hold the said tenements to *John Fisher*, and *Anne* his wife, and *Johanna* their daughter, and the longer liver of them successively, from the feast of *St. Michael* the archangel, thence next ensuing, the date of the said indenture, until the end and term of their natural lives; paying therefore annually during their lives as aforesaid, the yearly rent of thirteen shillings and fourpence, with an herriott of, &c. with a covenant on the part of *John Fisher* and his wife, and *Johanna* their daughter, to pay all free rents and other charges and duties issuing out of those

(m) *Hob. 314.*

lands during their lives as aforesaid, before the feast of *St. Michael* aforesaid ; and the said *Anthony Long* and *Alice* his said wife, delivered seisin in person to the said *John* and *Anne* his wife, and *Johanna* their daughter, according to the form and effect of the said indenture.

In the King's Bench upon a great debate of this cause, these points, among others, were resolved.

That *Anne*, the wife of *John Fisher*, and *Johanna* their daughter, could not take a joint estate with *John Fisher* by the said indenture of lease, because the said *Anne* and *Johanna* were not made parties to the said indenture, according to the case of *Winsmore* and *Hobart* then cited. And that *John Fisher* did not take any greater estate than for his own life, and not for the lives of himself, *Anne* his wife, and *Johanna* their daughter, because those two were intended to take an estate to themselves, and on that account, their names or lives should not be a limitation to, or increase the estate of *John Fisher*, against the intention of the deed.

The case of *Gilby v. Copley*(*n*), affords a large portion of useful information and material distinctions on this subject. The observations

(*n*) 3 Lev. 138.

of *Levinz*, to be found in that case, do not appear to have been contradicted. All the authorities agree, that even in an indenture made between parties, a person may take by way of remainder, although he cannot take as an immediate grantee; and we also find these distinctions propounded in the following terms, viz.

In *Gilby v. Copley*, in an action of debt, the declaration stated that the defendant by his certain deed, had promised to pay two hundred and ten pounds on the 16th of June next ensuing, for four hundred and forty-eight sheep, to the plaintiff, belonging to her as the executrix of her father, and sold to the defendant by *Thomas Waiver*, on the part of the plaintiff, as by the aforesaid writing appears, and that the defendant had not paid it. The defendant demands oyer of the deed, which is entered in these words: "Articles of agreement made between "*Thomas Waiver*, who is fully authorised "on behalf of *Elizabeth Gilby*, (the plaintiff) executrix to her father, as also on the "behalf of *William Saville*, who is trustee "on behalf of the children of the plaintiff's "father on the one part, and *Lionel Copley*, " (the defendant) on the other part, 16th "May 1682." In the first place, *Thomas Waiver* covenants, for the consideration after mentioned, that the defendant shall

enjoy the close called the *Sunke*, for eight years from Lady Day last past, the lessors to be at the charge of repairing the banks.

Item, the said *Thomas Waiver* hath sold to the said *Lionel Copley* four hundred and forty-eight sheep belonging to the said *Elizabeth Gilby*, as executrix to her father, being now upon the *Sunke*; in consideration whereof the said *Lionel Copley* hath paid in hand a shilling to the said *Waiver*, and doth covenant to pay seventy pounds rent for the *Sunke* for the first year, and for the second year one hundred pounds, at two equal payments, and the lessors shall have liberty to embank the *Sunke*; and the said *Elizabeth* may sell the bricks, unless she agree to sell them to *Copley*.

And further, the said *Lionel Copley* doth promise, (not said to whom) to pay to *Elizabeth Gilby* two hundred and ten pounds for the said four hundred and forty-eight sheep on the sixteenth of June next following. And then the defendant demurs upon the declaration. And it was argued by *Pemberton*, serjeant, for the defendant, that the action ought to be brought in the name of *Waiver*, and not in the name of *Elizabeth Gilby*. The articles were made between parties, and she not being a party to them, could not sue for, nor release any thing contained in those articles, as might be done if it had been a deed-poll, and not

between parties ; and cites, *Co. 2 Inst.* 673, *Scudamore's case*: *Bigland*, serjeant, contra.

The contract being on the behalf of *Elizabeth Gilby*, only as to the suit for the sheep, and the promise being general, and not to any person certain, she for whose benefit that was done, shall sue for it ; and cites *Dutton and Poole's case*, lately adjudged in the King's Bench, where the son promised to pay his father one thousand pounds immediately, in consideration that the plaintiff should forbear the felling of timber growing on his land : the action was brought by the sister, and adjudged properly brought by all the court. And of this opinion were *Jones* and *Charleton*, strongly upon the first argument ; and to this *Windham* was inclined : this bargain being made on the behalf and for the benefit of *Elizabeth*, she could bring the action, and the deed not being indented, would be no impediment or estoppel.

But Justice *Levinz*, contra ; and he said, that the indenting or no indenting of the deed is not material ; but the being or not being a party, is material. It is common doctrine that one who is not a party to a deed made between parties, cannot take by that deed, except by way of remainder ; and he cited a case between *Cooker* and *Child*, adjudged by *Hale*, and all the

Court (o) ; when an action was brought upon a charter-party which was this. This indented charter-party witnesseth, that *Baily*, master and part owner of the ship, with consent of *Cooper*, the other part owner, hath let the ship to *Child*, for such a voyage ; and *Child* covenants with *Baily*, and also with *Cooker*, to pay £300. *Cooker* brings the action, and the defendant *Child* pleads, that only he and *Baily* were the parties to, and sealed the indenture : whereupon the plaintiff demurred, and by all the court, “ although that the deed was by indenture, still not being *between parties*, a “ covenant in that could not be made with a “ stranger, if it had been a deed poll, or in the “ first person, Knowye, that I, &c. otherwise “ if it had been made between parties : there “ no stranger could take advantage upon that “ by way of action ; ” and there the case of *Co. 2 Inst.* was cited by *Sir William Jones* at the bar, and affirmed by the court to be good law. And here the deed could not be in execution of an authority ; for then it ought to have been made in the name, and sealed and subscribed with the name of the master. And to the case of *Dutton and Poole*, that was in assumpsit on a verbal promise, and not founded upon a deed as

(o) Hil. 24, 25 Car. 2. B. R. sed. intrat. Trin. 24 Rot. 663,

this is. And he cited also the case of *Offly and Ward*, in King's Bench, *Hil.* 19 & 20 *Car.* 2. Debt by *A.* upon a single bill made to *A.* by the defendant to the use of *A.* and *B.* *A.* brings an action, to which the defendant pleads a release by *B.* and adjudged no bar; for he being a stranger to the bill could not release it, although it was for his own use; and the book of *Edw.* 4. which says, that if a bill or bond be made to *A.* to the use of *B.*, that *B.* could bring an action on it, was denied to be law. But 3 *Cro.* 729. *Shaw v. Sherwood*, is allowed to be law, where a bill sealed was such; "Received of *A.* " to the use of *B.* equally to be divided, to " be repaid at such time as shall be most for " the profit of *B.* and *C.*" each may sue for his £20, for the deed is not made to either. But if it had been an obligation to *A.* for the payment of £20 a piece to *B.* and *C.* neither of them could have sued for it, but the suit must be in the name of *A.* And the said case was affirmed in a writ of error, as appears in *Yelv.* 23. But in the principal case, *curia advisare vult*; and I suppose that the parties agreed, for I never heard of it afterwards.

In *Newnam on Conveyancing* (*p*), the

points are thus collected though not very correctly.

If there be *two* grantees, and one of them takes by deed, it is sufficient (*q*) ; but if the grant be to one that *is no party* to the deed, and not the grantee himself, in this case although the grantee, and he to whom the grant is made, be capable, and never so well described by their names, yet is the grant void ; for no grant can be made but to him that is party to the deed, except it be by way of remainder : and therefore if a man makes a lease for term of life, and after the lessor grants *to a stranger*, that the tenant for life shall have the land to him and his heirs ; this grant is void *et sic de similibus* ;— and it seems in some cases, that if one of the grantees be party to the deed, that another grantee, that is no party to the deed, may take with him ; and therefore the case was, *Robert* gave the reversion of the lands which *Agnes* his wife held for her life to “ *Stephen de la Moore, habendum post mortem dictæ Agnetis in liberum maritagium, cum Johanna filia ejusdem Roberti.*” in this case it was adjudged that although *Joan* was not

(*q*) Thereby meaning that a grant to *two*, of whom only *one* is capable, either in personal qualification, or from the form of the instrument, is good to the one.

named before the habendum, yet that she should take in tail with her husband (*r*).

It is, however, to be observed, that *Stephen Moore's case* (*s*) turned on the peculiarity of a gift in frankmarriage. Lord *Coke* treats it as a remarkable case, (*t*) and *Herlet* put the case on the point of the form of a gift in marriage, namely, "*quod talis dedit tali in liberum maritagium cum tali filia sua;*" and there the wife takes with her husband.

Besides, it cannot be collected that the gift was made by an indenture between parties. The singularity of the case is that the wife takes by implication, rather than from a grant to her in express terms; and hence Lord *Coke's* observation in fo. 21. "albeit the gift is made of the lands to the man with his daughter, &c." yet is the gift good to *both* of them in special tail: and he adduces *Stephen de la Moore's case* as an authority for that position.

In *Nurse v. Frampton* (*u*), there was a deed and not an indenture. In its form it stood thus. It was agreed that a grey nag, &c. in witness whereof we have hereunto set our hands and seals; and the court in answer to

(*r*) Cites Doctor and Student, 94. Co. Litt, 21. 231. 5 Ed. 3. 17.

(*s*) Year Book, 3 Ed. 3. 17.

(*t*) fo. 21. a.

(*u*) 1 Salk. 214.

the authority of 2 *Inst.* 673. 3 *Cro.* 59. and 2 *Roll.* 22. held that the cases were not alike, and that an action would lie by the bare signing and sealing.

By several authorities, and by the general rule, it is settled that in a deed poll, a person may be a grantor or grantee, a covenantor or covenantee, merely by being named as an efficient party either actively or passively, in the deed.

Lord *Coke* (t) further opens the point of this learning in commenting on *Littleton*. The text is

“ Also if an estate be made by *indenture*(u)
“ to one for term of his life, the remainder
“ to another in fee upon a *certain condition*,
“ &c. and if the tenant for life have put his
“ seal to the part of the indenture, and
“ after dieth, and he in remainder entreth
“ into the land by force of his remainder,
“ &c. : in this case he is tied to perform all
“ the conditions comprised in the inden-
“ ture, as the tenant for life ought to have
“ done in his life-time, and yet he in the
“ remainder never sealed any part of the
“ indenture. But the cause is, for that
“ inasmuch as he entered and agreed to have
“ the lands by force of the indenture, he is

(t) 1 *Inst.* 230. b.

(u) See s. 375. as to deeds poll.

“ bound to perform the conditions within
“ the same indenture, if he will have the
“ lands, &c.”

And the comment is, “ albeit he in the
“ remainder be no party to the indenture,
“ (the parties thereunto only being the lessor
“ and the tenant for life) yet when he in re-
“ mainder entreth and agreeth to have the
“ lands by force of the (v) indenture, he is
“ bound to performe the conditions con-
“ tained in the indenture. And here is also
“ a diversity to be understood, that any
“ stranger to the indenture may take *by way*
“ *of* remainder, but he cannot in this case
“ take any present estate in possession,
“ because he is an estranger to the deed.”

And Lord *Coke* continues to observe,
“ if *A.* by deed indented betweene him and
“ *B.*, letteth lands to *B.* for life, remainder
“ to *C.* in fee, reserving a rent, tenant for
“ life dieth, he in the remainder entreth into
“ the lands, he shall be bound to pay the
“ rent; for the cause and reason before
“ yielded by *Littleton*. An indenture of
“ lease engrossed betweene *A.* of the one
“ part, and *D.* and *R.* of the other part,
“ which purporteth a demise for yeares by
“ *A.* to *D.* and *R.*, *A.* sealeth and delivereth

(v) 1 Inst. 230. b.

“the indenture to *D.*, and *D.* scaleth the
“counterpart to *A.*, but *R.* did not seal and
“deliver it. And by the same indenture it
“is mentioned, that *D.* and *R.* did grant to
“be bound to the plaintiff in twenty pound
“in case that certain conditions comprised
“in the indenture were not performed. And
“for this twenty pounds *A.* brought an
“action against *D.* only, and shewed forth
“the indenture. The defendant pleaded,
“that it is proved by the indenture, that
“the demise by indenture was made to *D.*
“and *R.*, which *R.* is in full life, and not
“named in the writ. Judgment of the writ.
“The plaintiff replied, that *R.* did never
“seal and deliver the indenture, and so his
“writ was good against *D.* sole. And there
“counsell for the plaintiff tooke a diversitie
“betweene a rent reserved which is parcell
“of the lease, and the land charged there-
“with, and a summe in grosse, as here
“the twenty pound is ; for as to the rent,
“they agreed that by the agreement of *R.*
“to the lease, he was bound to pay it; but
“for the twenty pounds that is a summe in
“grosse, and collateral to the lease, and not
“annexed to the land, and groweth only
“by the deed, and therefore *R.*, said he,
“was not chargeable therewith, for that he
“had not sealed and delivered the deed.—
“But inasmuch as he had agreed to the

“lease, which was made by indenture,
“he was chargeable by the indenture for
“the same summe in grosse ; and for that
“*R.* was not named in the writ, it was ad-
“judged that the writ did not abate.”

“So where three were enfeoffed by deed,
“and there were several covenants in the
“deed, on the part of the feoffees, and only
“two of the feoffees sealed the deed, the
“third entered and agreed to the estate con-
“veyed by the deed, he was bound in a
“writ of covenant by the sealing of his
“companions. 2 *Roll. Rep.* 63. In 38
“*Edw.* 3. p. 9. it is said, that if land be
“leased to two for years, and only one puts
“his seal, but the other agrees to the lease,
“and enters and takes the profits with him,
“he shall be charged to pay the rent though
“he has not put his seal to the deed ; but
“if there be a condition comprise in the
“deed which is not *parcel of* the lease, but
“a condition in gross, if he does not put his
“seal to the deed, though he be a party to
“the lease, he is not party to the condi-
“tion (*w*).”

And it remains to be added, that in
Salter v. Hedgly (*x*), Lord Chief Justice
Holt held that a party to a deed cannot

(*w*) Note to 1 Inst. 231. b.

(*x*) Carth. 76.

covenant with one who is no party to it ; but that one who is no party to the deed may covenant with one who is a party, and oblige himself by sealing of the deed.

The case was to this effect :

In covenant, &c. the plaintiff declared that (the defendant) by a certain writing made (at such a day and place) the counterpart of which is sealed with the seal of *Ridgly* himself, and this is produced in court, reciting as followeth: *imprimis*, (here all the deed was recited) and the breach assigned was, that one *Rock* had not paid rent to the plaintiff.

The defendant craved oyer of the deed which was entered in these words, and it was to the effect following, (*viz.*) “ Articles of agreement made between *John Salter*, “ of the one part, and *Charles Rock* of the “ same county, baker, (but did not say of “ the other part), as followeth ; *imprimis*. “ That the said *John Salter* doth for himself, “ his heirs, and assigns, set and let one “ house or tenement called, &c. unto the “ said *Charles Rock* for the yearly rent of, “ &c. payable quarterly. And whereas “ the aforesaid *Charles Rock* hath agreed “ and taken the house aforesaid, paying the “ rent quarterly, and leaving it in good “ repair ; and that the said rent may be “ satisfied as aforesaid, be it known unto “ all men, that *I, John Ridgly*, do covenant

“ for myself, &c. on the behalf of the said
“ *Charles Rock*, that is to say, that the said
“ *Charles Rock* shall pay the rent and per-
“ form the other covenants, &c.” reciting
them particularly, &c. which deed was
sealed by *Rock* and *Ridgly*; and after
oyer, the defendants demurred generally.

And it was argued for him that he was
not bound by this covenant, because he
was not a party to the deed ; and it is a
rule in law, that he who is not a party
to the deed, can never give or take any
thing, &c. except it is by way of remain-
der, which is not this case, and for autho-
rities in point the cases in the margin were
cited (y).

It was argued for the plaintiff that this
deed was in the nature of two deeds, upon
one and the same piece of parchment (which
might very well be, as it was agreed on all
sides,) and therefore the defendant shall be
obliged by it ; and it doth not appear in this
case, whether the deed was indented or not,
so that if it is taken as a deed of the first
person, and a stranger, he may be very well
obliged by such a deed to have any thing
performed as a *fide jussor*, which in former

(y) 3 Cro. 56. *Skidmore v. Vandevestan*, 2 Inst. 673. 2 Roll.
Abr. 220. 2 Cro. 359. *Goodman v. Knights*, 1 Inst. 352. Roll.
72. See Lev. 138. *Gilby and Copley*, 2 Lev. 74. *Cooker v. Child*.

days was a customary form ; and to prove this were cited the cases in the margin (z). And it was also said one who is not a party to the deed may be made an attorney by the deed itself, to make livery and seisin upon a feoffment (a). And where an attorney is made by a deed to which he is a stranger, the deed itself may be by indenture as well as by deed poll.

And in addition to the point so ruled by *Holt*, Chief Justice, the court was clear in opinion that the action did lie against the defendant upon this deed.

And it is to be observed that this case arose on an instrument which was not indented, and hence the observation of *Holt*, Chief Justice, as found in a report of the same case, viz. "This doth not appear to be an indenture : it is *per quoddam scriptum fact, &c.*" In *Shower's Report* the opinion of *Holt*, Chief Justice, is stated in these terms : "Why cannot a man oblige himself by a deed, if there be express words for it and he seals it ? Suppose at the end of an indenture it be 'And be it known unto all men, that *A.B.* for himself covenant, &c.' and he seals it, why not this oblige him ? A man cannot take immediately where he is not a party ;

(z) 40 Ed. 3. 5. Fitz. Ab. Tit. Oblig. 16. F. N. B. 146. b.

(a) 1 Inst. 52. b.

“ but where do you find that a man cannot
“ give without being a party ? In a deed of
“ feoffment, a warrant of attorney to *A.* not
“ a party, is good now, though formerly held
“ to be otherwise.”

To resume the general observations on this head, it is usual with some gentlemen in describing the parties, to arrange them under different heads, according to the different characters or the circumstances under which they are to act or to grant. For instance, when *A.* is a beneficial owner, and also a trustee with *B.*, they make *A.* a party of the first part, and *A.* and *B.* parties of the second part ; and they observe a like course when one person is to take estates or receive benefits under different characters, or in different modes ; for example : when *A.* is to be a trustee jointly with *B.* of one estate, and a trustee jointly with *C.* of another estate, they make *A.* and *B.* parties in one clause, and of one part, and *A.* and *C.* parties in another clause, and of another part.

There is an accuracy in this mode of practice, since it opens to the mind the different operations of different parts of the deed. It also facilitates the remembrance of the different characters in which the parties are acting. But the rule of law does not require this or any other like arrangement.

of the parties. Though *A.* and *B.* are parties only in one clause, they may be grantors or grantees, covenantors or covenantees, either jointly or severally ; and although they are named jointly, and the grant be to one of them separately, or the nomination of the other be a mere dead letter, still the deed will not be in any manner invalidated.

3dly. Of the Testatum Clause.

In the testatum clause it is usual to express the consideration for which the release is made, and the mode of expressing the consideration must be governed by circumstances, so as to adapt the language of this part of the instrument to the facts and the intention of the parties.

By the rules of the common law no consideration is necessary to the validity of a release, or of any other deed. The consideration is added, for the purpose only of shewing the equitable title, or rebutting the presumption which would raise a resulting use or resulting trust, or to shew on the internal evidence of the deed, that the deed was not voluntary, &c. so as to be fraudulent against creditors or subsequent purchasers.

That there may be a resulting trust under a conveyance by lease and release, for want of a consideration, is perfectly clear: whether

there may be a resulting use, is a point which requires more minute investigation ; and on that point, some observations will be afforded in the division which respects the declaration of use.

Sometimes the consideration is merely nominal.—In that case the receipt is acknowledged very briefly by the words—“the receipt whereof is hereby acknowledged;” and when the nominal consideration is paid to several persons, the clause should be in this form or to this effect :—“ the receipt whereof respectively they do hereby respectively acknowledge ;” or thus, “ the receipt of which said sums of and to the said respectively paid as aforesaid, they respectively do hereby acknowledge.”

When a full and valuable consideration is paid, the receipt for the consideration should be expressed more fully as in the subjoined clauses, and these clauses should vary according to the mode in which the consideration is to be paid. The form in which the consideration is expressed, and of these receipts are now to be added.

1. A simple Form of Consideration paid by one to one.

*In consideration of £ of lawful money
of the united kingdom of Great Britain and*

*Ireland, current in Great Britain, to the said
 , as the executrixes of the will of the said
 , well and truly paid by the said
 , immediately before the execution of these presents, with the privity, consent, and approbation of the said , the husband of the said , and in full for the absolute purchase of the said and the fee-simple and inheritance thereof; The receipt of which said sum of £ the said do hereby acknowledge, and of and from the same sum and every part thereof, do hereby acquit, release, and for ever discharge the said , his heirs, executors, administrators, and assigns, and every of them.*

When the Consideration is paid by several to several in certain Proportions,

And in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, paid by the said and in equal moieties, immediately before the execution of these presents to the said J. P. and M. his wife, and F. and G. in the proportions hereinafter mentioned, (that is to say) as to the sum of £ being one moiety or equal half part of the said purchase money, or sum of £ to the said J. P. and M. his wife, or one of

them. And as to the sum of £ being one-fourth of the said purchase money or sum of £ to the said F.; and as to the sum of £ being one other fourth part and residue of the said sum of £ to the said G. in full, for the absolute purchase of their respective shares of and in the said messuages, &c. hereby released or otherwise assured or intended so to be and the feesimple and inheritance thereof with the appurtenances; The receipts of which said several sums of £ and £ and £ , making together the sum of £ to the said J. P. and M. his wife, and to the said F. and G. respectively paid as aforesaid, they the said J. P. and M. his wife, F. and G. do hereby severally and respectively acknowledge, and of and from the same sums respectively, and every part thereof, do, and each and every of them doth hereby acquit, release, and for ever discharge the said and respectively, and their respective heirs, executors, administrators, and assigns, and every of them,

When the Consideration is as to Part
secured by Bond.

That in consideration that the said bond of the said R. A. C. bearing even date with these presents, hath been given and entered into to

the said E. F. as aforesaid for securing the principal sum of £ and interest, and also in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said F. N. well and truly paid by the said R. A. C. immediately before the execution of these presents; and making together with the said principal sum of £ so secured by the bond of the said R. A. C. as aforesaid, the sum of £ being the full consideration agreed to be given by the said R. A. C. for the purchase of the said messuage, &c. and all the estate and interest of the said F. N. therein, discharged from any lien or claim at law or in equity, by reason that part of the said consideration is secured by the said bond of the said R. A. C. to the said E. F. and not paid: The receipt of which said sum of £ she the said E. F. doth hereby acknowledge, and of and from the same sum and every part thereof doth hereby acquit, release, and for ever discharge the said R. A. C., his heirs, executors, administrators, and assigns, and every of them.

Another Form.

That in consideration of the said sum of £320, paid by the said C. J. to Messrs. S. D.

and S. in part of the said sum or purchase money of £1600, and paid by them to the said I.S. and I.B. with such consent and approbation as aforesaid ; And also in consideration of the further sum of £1280 of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, residue of the said sum of £1600 to the said I. S. and I. B. well and truly paid by the said C. J. immediately before the execution of these presents, with the privity, consent, and approbation of the said C.C. and which said several sums of £320 and £1280, making together the said sum of £1600, have been paid to, and are received by the said I. S. and I. B. in part satisfaction and part discharge of the principal money and interest now due and owing to them on the mortgage or security made to them and the said R. M. and F. C. as aforesaid, and as to them, and also the said C. C. are in full for the absolute purchase of the messuage, &c. hereby released and codenanted to be surrendered or otherwise assured or intended so to be ; the receipt of which said sums of £320 and £1280, making together the said sum of £1600, they the said I.S., I. B., and C. C. do hereby severally acknowledge, and of and from the same sum and every part thereof, do hereby acquit, release, and for ever discharge the said C. J. his heirs, executors, administrators and assigns, and every of them.

Another Form.

That in consideration of the premises, and for and in consideration that the sum of £3620 of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, is to be paid to the said T. M. and S. D. S. immediately after the sealing and delivery of these presents by the said Accountant General of the said Court of Chancery, by his cheque or note on the Governor and Company of the Bank of England, being the said sum of £3620, raised in such manner as is hereinbefore mentioned or recited, pursuant to the direction of the said order of the 11th day of July last; the receipt of which said sum of £3620 the said T. M. and S. D. S. are to acknowledge by a memorandum to be indorsed on these presents; and of and from the same sum when paid, and every part thereof, they the said T. M. and S. D. S. do, and each of them doth declare, that the said Accountant General of the said Court of Chancery, and also the said Lord R. his heirs, executors, administrators, and assigns, and every of them, shall be acquitted, exonerated, and discharged for ever by these presents; the same sum of being in full for the absolute purchase of the inheritance in fee-simple in possession of the said hereditaments and premises hereinafter described, and intended to be hereby granted and released.

Another Form.

And in consideration of the sum of £ of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said well and truly paid by the said immediately before the execution of these presents, on the nomination and at the instance and request of the said testified by his executing these presents, and in part of the principal monies and interest now due and owing to the said on the security of the several mortgages made to him as aforesaid, and in full for the absolute purchase of the fee-simple and inheritance of the said freehold and copyhold lands and hereditaments hereinafter described, and hereby released, and covenanted to be surrendered or otherwise assured, or intended so to be discharged of and from the payment of all or any part of the residue of the same principal money and interest, or any contribution on account thereof; the receipt of which said sum of £ the said doth hereby acknowledge, and of and from the same and every part thereof, doth hereby acquit, release, and for ever discharge the said his heirs, executors, administrators and assigns, and every of them.

And these forms vary with the circumstances to a degree which will be as infinite

as the transactions of mankind admit—and often the motives to settle, to bar intails, &c. &c. are expressed as the consideration.

Formerly the practice was for each person to give a separate and distinct acknowledgment for the consideration paid to him respectively.

In modern practice, it is more usual for the several persons to whom distinct sums of money are paid, to acknowledge the receipt of the sums paid to them respectively by one and the same clause, as shewn in one of the forms already given.

The acknowledgment of the receipt is merely a formal and not an essential part of a deed. Little or no advantage is derived from it. The only real use of it is to enable the releasee to plead the receipt, and the super-added release in bar to any action for the consideration money (a).

To the receipt in the body of the deed is usually added, a receipt to be indorsed on the deed. This receipt is more necessary and useful than the acknowledgment in the body of the deed, since this receipt is regarded by courts of equity; insomuch that when the receipt is signed, it is not incumbent on a future purchaser, unless circum-

(a) *Thurle v. Madison*, Styles 462.

stances, as notice, &c. &c. impose on him the duty of further investigation, to enquire whether in fact the purchase money has been paid. On the other hand, the want of this receipt is implied notice that the purchase money remains unpaid, and that the lands remain charged in equity with the payment of the consideration.

In deeds of modern date, therefore, care should be taken that the receipt for the consideration money is indorsed and signed, or that distinct evidence can be given of the payment of the purchase money.

The want of this receipt on deeds of ancient date, is not so material ; especially if the possession has gone with the deeds : From the length of time the payment of the consideration money will be presumed.

Also when it is stated in the recital of deeds, that the *consideration has been paid* at a former period, and the conveyance is in consideration of payment having been so made, it is neither usual or formal, to add a receipt by indorsement. The receipt as acknowledged in the body of the deed, or the recital, which is evidence of such receipt, has all the effect *in equity*, which would be ascribed to a receipt by indorsement. The reason which introduced the practice of indorsing the receipt, does not apply to a case attended with these circumstances.

It is well known that deeds are frequent-

ly executed before the purchase money has been paid ; and in equity, the payment of the money might be enforced, although the receipt of it be acknowledged in the body of the deed, when in fact the payment was never made. This rule of courts of equity introduced the general practice of indorsing the receipt on the deed ; and the omission to indorse the receipt, and consequent departure from general practice, is deemed by a court of equity, implied notice that the purchase money has not been paid. It is, however, merely implied notice : payment may, therefore, be proved, although there be no receipt for the money indorsed on the deed. Such evidence will be an answer to the presumption raised in favor of the seller from the omission to take the receipt : and although a receipt should be signed, yet the purchaser and the land he has purchased while it remains in his hands will be liable in equity till the money has been paid. Unless it can be made out as a fact, that the lien was not to subsist, equity will affect a future purchaser ; who takes with notice that the purchase money remains unpaid (a). The difference between the two cases is, when there is a receipt indorsed on the deed, future purchasers may rely on

(a) *Mackreth v. Symmons*, 15 Ves. 329.

such receipt, unless they can be affected with notice, that the seller retains an equitable lien ; but when the deed is expressed to be in consideration of a sum of money paid at the time of the execution, and no receipt is indorsed on the deed, or a receipt is indorsed and not signed : this omission, as it affords ground for a suspicion, so it raises the presumption, that the seller retains his equitable lien. This omission, of a form observed in general practice, is, in the view of a court of equity, that species of notice which will impose on the purchaser the obligation of taking care that the purchase money has been or shall be paid. For this reason, also, it is usual in abstracts to state at the foot of the abstract of each deed, that a receipt is indorsed, &c. and by whom it is signed.

A very common method also of expressing the consideration when paid to several parties, used to be to insert the consideration paid to each person immediately before the words of grant proceeding from that person : so that the consideration was expressed in different clauses, severed by interposed words of grant ; thus—"The said
 " in consideration of hath, &c. and
 " the said in consideration of hath,
 " &c." or thus : "in consideration of the
 " said hath, &c. and in consideration of
 " the said hath, &c."

In modern practice, except in very par-

and to hold the same unto the said *Bass*, his heirs and assigns: To the use of such person or persons, and for such estate or estates, and in such manner as he the said *Topham*, during his life, should by any deed appoint, and for want thereof, To the use of the said *Topham* and *Bass*, and the heirs and assigns of the said *Topham* for ever; the estate of the said *Bass* being in trust for the said *Topham*, his heirs and assigns for ever. The lease for a year was made between the said *Thickston*, of the one part, and the said *Bass*, of the other part; and thereby the said *Thickston*, in consideration of five shillings to him paid by the said *Bass*, did bargain and sell to the said *Bass*, his executors, administrators, and assigns, all the said premises, to hold the same to the said *Bass*, his executors, &c. from the day next before the day of the date thereof, for the term of one year at a pepper-corn rent: to the intent, that by virtue thereof, and of the statute for transferring uses into possession, he the said *Bass* might be in actual possession of the premises, and be thereby enabled to take a grant and release of the reversion and inheritance thereof, to him and his heirs; to and upon such uses, &c. as should be declared by the said indenture of release.

It was admitted, that the only objection to the defendant's title was in the insertion

of the *name of J. Topham*, as releasee instead of *G. Bass*, in the indenture of 24th March, 1781. The question for the court was, whether the defendant could make a good title to a purchaser? if he could, a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

The case cited for the plaintiff was *Cro. Eliz.* 903, 4; and the cases cited for the defendant were *Co. Litt.* 7. *a. Shep. Touch.* 75. *Butler v. Elton*, *Cary's Rep.* in *Cha.* 122, and *Erles v. Lambert*, *Alleyn*, 41, to shew that a grant is good, although the name of the grantee be omitted in the premises of the deed, provided it be mentioned in the habendum.

Lord Ellenborough, Ch. J. gave the judgment of the court; declaring the cases cited were perfectly satisfactory in authorising the court to put a construction on the deed, in support of it, which from the reason and good sense of the thing, the court would probably have done, without such authorities.

In *Trethewy v. Ellesdon* (c), the indenture was made the 29th day of September, &c. between *Nicholas Cossen*, &c. of the one part, and *Elizabeth Cossen*, &c. and *Nicholas Cossen*, the younger, son of the said *Elizabeth*, of the other part; and it witnessed,

(c) 2 Ventris, 141.

that whereas the said *Elizabeth Cossen* had given and surrendered into the hands of the said *Nicholas Cossen*, one indenture of lease of an annuity, dated the 15th March, 1657, of ten pounds yearly, going out of all that his barton and demesne called *Mulden*, for a term yet to come, as in and by the said indenture of lease more fully and at large appeareth, *hath* given, granted, and confirmed, and in and by these presents, doth give, grant, and confirm unto the said *Elizabeth Cossen*, her heirs and assigns, by these presents, one annuity, &c. to have, receive, and take yearly the said annuity to the said *Elizabeth Cossen* and *Nicholas Cossen*, the younger, and the survivor and survivors of them at the usual feasts, &c.

And it was argued for the plaintiff, that there was no sufficient grant by this indenture; for it is said to be made between *Nicholas* of the one part, and *Elizabeth* and *Nicholas Cossen*, junior, of the other part, and then recited the surrender of a former grant; after which came these words, “*hath given and granted, and by these presents doth give and grant, &c.*” and no grantor named.

But the court were of opinion as to the matter, that it was a good grant, the indenture being between *Nicholas Cossen*, of the one part, and *Elizabeth* of the other part;

and then after a recital saith, "hath given
"and granted to *Elizabeth*, &c." that must
be taken that *Nicholas Cossen* hath given
and granted.

The usual words of grant in this assurance are as to trustees, "bargain, sell, and
"release," and as to persons beneficially interested as owners, "grant, bargain, sell,
"release and confirm."

The formal and more efficient words are
"release and confirm." Either of these expressions will be effectual for the object to be attained: even if both these words should be omitted, either of the other words would, it is apprehended, enable the grantee, being the owner of a particular estate capable of enlargement, to plead the deed as a release.

When the grant is made at the request or under the direction, &c. of any person, the request, &c. are generally introduced in this form:—

"The said at the instance and request, and by the direction and appointment of the said A. B. and with the privity, consent, and approbation of the said C. D. testified by their respectively executing these presents, hath granted, &c. and by these presents doth, &c."

Formerly it was usual to repeat this clause after the words of grant in the past and also in the present tense;

But by adding the words of direction, &c. immediately before the words of grant in the past tense, the language of direction, &c. equally governs the words in the present tense.

This is then the more neat, and now the more usual mode of introducing the clause of direction, &c. It avoids a repetition which is always ungrateful to those who read legal instruments.

When there are several grantors, the clause of grant is, in more correct practice, introduced by words of joint and several grant, viz. the said A. B. C. D. and E. F. have, and each and every of them hath granted, &c. and by these presents do, and each and every of them doth, &c. And frequently different grantors are arranged in classes, so as to shew the different circumstances under which, and the different characters in which, the grantors act. A complex form is added, as best illustrating the utility and even the object of this arrangement. In exercising powers given to *several* persons jointly, no words of severance, as in the case of a joint and several grant, are used.

In this clause also, the releasee ought to be named. This is proper, though not absolutely necessary. It was formerly the opinion, that though a grant might be good without an habendum, an habendum could not be good without a grant. As far

as respects the grantee, the law to be collected from *Spyve v. Topham* (d), and the cases there cited, is, that though the grantee be not named in this part of the deed, or though some other person be named by mistake, yet the grant will be good, if from the context, and in particular the habendum, &c. the intended grantee can be ascertained beyond all reasonable doubt; and if the grant be to several, and some of them only are capable of taking, the grant will be good to those alone who are capable.

It is also usual to express in this clause the words of limitation when an estate in fee is to be conveyed. This is only a formal part of the deed, nor is it necessary when there is an habendum, since the habendum is in point of law the proper part of the assurance for introducing the words of limitation, for it is the office of the premises to name the grantee, and describe the parcels, and of the habendum to limit the estate.

But it may be observed, that if the habendum be inconsistent with the grant in the premises, the grant in the premises will prevail, and the habendum be rejected (e).

(d) 3 East. 115.

(e) Sheppard's Touchstone, 98.

Auditor King's case, cited 8 Rep. 56.

Therefore, if a grant be made to A., and his *heirs*; habendum to him for *his life*, or to him and his executors for years; the grant will prevail, and the habendum be rejected.

Whenever the grant in the premises can be rendered consistent with the limitations in the habendum, the words in the grant will be qualified by the words in the habendum (*f*). The rule is, that where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words (*g*).

Thus, if a grant be to A. and his heirs, habendum to him and the heirs of his body (*h*), or habendum to him and his heirs, during the life of some other person or several persons: in the former case only an estate tail, and in the latter case, only an estate for life or lives will pass, because in both these instances, the word "heirs," in the habendum, is rendered consistent with the word "heirs" in the grant (*i*).

(*f*) 8 Rep. 154. b.

(*g*) 7 Edw. 3. Mortimer's case, 8 Rep. 154. b.

(*h*) Co. Lit. 21.

8 Co. 154.

Moor 87.

Cro. Jac. 476.

(*i*) Grant to two, habendum to one for life, remainder to another, Shep. Touch. 109.

Co. Litt. 183.

And when the grant and the habendum import the gift of different estates, as a grant to A., and the heirs of his body, habendum to him and his heirs, an estate in tail will pass by the grant in the premises, and the remainder in fee will pass by the habendum (*k*).

It would have been the reverse if the grant had been to A. and his heirs, habendum to him and the heirs of his body, for the habendum would have qualified the grant.

So the habendum may destroy the effect of the grant, and render void a deed which, without the habendum, would have been good : as when a grant is made to A. for his life, or to A. and his heirs, without any habendum (*l*), the grant may operate according to the intention of the parties ; but by the addition of an habendum, 'To hold from *a day to come*, or from *an event*, thus importing to pass an estate of freehold under the rules of the common law, and to commence in futuro, which is contrary to the rules of that law, the

(*k*) 2 Co. 55.

Hob. 171.

Cro. Eliz. 254.

9 Co. 476.

3 Lev. 339.

(*l*) Co. Litt. 21. a.

8 Rep. 154. a.

Shepp. Touch. 108.

habendum will destroy the effect of the grant, and the deed cannot operate either under the grant, or under the habendum (*m*). Also the habendum may regulate and modify the language of the grant, as in the instance of a grant to two, habendum to one for life, remainder to another in tail or in fee ; and in the instance of a grant to two persons, of lands, habendum, one moiety to one in fee, and the other moiety to the other in fee.

As it is the proper office of the premises of a deed to name the grantee, and of the habendum to limit the estate, it is highly expedient to observe this regulation, so as to introduce the limitation of estate into the habendum without attempting to express the estate in the premises. General convenience enforces this regulation. It facilitates practice : it aids the judgment ; it assists the memory ; it enables men of experience to perform their duty with dispatch and with judgment. And each of these considerations is of importance to the public as well as the individual practitioner.

3dly, The lease for a year is generally recited in this part of the release. Some-

(*m*) Baldwin's case, 2 Rep. 23.

Shep. Touch. 109.

1 Inst. 183.

(*n*) Buckler's case, 2 Rep. 55. 1st resolution,

Hogg v. Cross, Cro. Eliz. 254.

times, though not very frequently, it is recited after the clause, "All the reversion." It is immaterial in what part of the deed this recital is introduced. But as it is more generally expected to find this clause in this part of the assurance, there is, with a view to practice and professional habits, a convenience in having it inserted in this part of the deed.

It is observable also, that the recital is only a formal and not an essential part of the release; for if, in point of fact, there be a lease, it is of no consequence that the recital is omitted. The object of the recital is to make it evidence of the lease as against the releasor, and those who claim under him.

In practice it is doubted by some gentlemen of experience, whether this recital operates by way of evidence or estoppel; and those who think that it operates by way of estoppel, contend, that in recovery deeds, and as against the issue in tail, or the persons in remainder or reversion, the recital cannot be used, since persons of this description claim under the original donor, and are not bound by estoppel. But considering the recital as evidence only, and not as estoppel, there does not seem to be any well founded reason against the admission of this evidence, in a question in which the issue are concerned, or, as in the case of recovery deeds, the reversioners or remainder-men are in-

terested. There is an incongruity in admitting that the release is operative at the time of suffering the recovery, and inoperative at a future day, under the same identical evidence.

In *Ford v. Lord Grey* (o), it was resolved that the recital of a lease in a deed of release, is good evidence of a lease against the lessor, and those that claim under him. In *Salkeld*, there is a report of the same case (p). There is the qualification, that as to others it is not evidence, without proving that there was such a deed, and that it has been lost or destroyed.

The cases on this point with their distinctions will be found in *Com. Dig. Evid. B. 5*.

By an act of parliament in *Ireland*, a recital of a lease for a year is conclusive evidence of a lease for a year, and no lease is prepared. In some of the *West India islands* also, and particularly in *Jamaica*, no lease for a year is used.

When a recital of a lease for a year is introduced, it should be in this form :

*In the actual possession of the said
now being, in virtue of a bargain and sale
thereof made to him by the said
in consideration of five shillings, paid to*

(o) 6 Mod. 44.

(p) 1 Salk. 285.

each of them by the said . . . , by indenture, bearing date on the day next before the day of the date, and executed before the execution of these presents for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession.

Or it should be with such variations, as the circumstances of the case may require. It should express by whom and to whom the bargain and sale is made, and on what consideration; and that by force of the statute of uses the grantee is in the actual possession.

The expression, however, that the grantee is in the actual possession, is not strictly correct. The bargain and sale gives the estate only, not the possession. Any expression which shews that the grantee has a vested estate for one year, will be more correct; but an attempt to change the present form, would meet with opposition, and would not be productive of any benefit, except under the rule, *qui bene distinguet bene docet*.

Let it also be observed, that when a conveyance is made by a corporation by lease and release, and the lease is perfected, as in prudence it ought to be by entry, the re-

cital in the release of the lease for a year should advert to and notice the entry, instead of referring, as is usual in ordinary cases, to the statute of uses. The declaration also at the end of the lease for a year, instead of being in the common form, should state that the demise is made to the intent that by virtue of these presents, and *an entry* to be made by force of the grant or demise hereby made, the said (the grantee) may be in actual possession, &c.(p)

4thly, Of the Parcels.

No part of a deed requires more attention than that which contains the parcels.

In all cases, care should be taken that all the lands intended to pass, are included; and that no lands are included except those intended to pass; and the lease and release should severally contain, either in words, or in substance, precisely the same parcels: general or comprehensive terms, should receive minute attention, to guard against mistakes in this particular.

(p) Buckler's case, 2 Rep. 55. 1st Resolution.
Hogg v. Cross, Cro. Eliz. 254.

At law, no more will pass than is well described : and all that is described, and that the grantor is competent to convey, will pass.

As between a seller and his heirs, and a purchaser and his heirs, a court of equity will correct any error, by supplying the omission of any parcels by mistake, or decreeing a reconveyance of parcels included in the conveyance, but not intended to pass.

But (q) the issue in tail, or persons in remainder, are not bound to supply any omission. This is, often, relevant and material, in regard to the effect of recovery deeds.

In general, it is right to adopt the description contained in the former deeds, unless on account of a division of an *entire thing*, as a manor or farm, into parcels, such description would be irrelevant. When such subdivision takes place, the new description should be made as simple as may be, and the attention should be directed to select those circumstances of description which will distinguish the property from any other.

After enumerating the parcels by their denomination, as a manor, farm, &c.

(q) In a conveyance by tenant in tail.

the leading circumstances of description are numbers, quantities, name, local situation, as to township, parish, &c. occupation, rent, abuttals, or boundaries, or the like : and in case any words are used in reference to a former description, these words should make the reference as clearly and distinctly, and at the same time as simply as may be. Complexity and accumulation of description, should be studiously avoided.

In general, descriptions which depend on words of reference involve too much language, and accumulate description on description, until they have rendered the description so complex, as to be hardly intelligible ; at all events, to be intelligible only by a great exertion of the mind, and a minute comparison between the words of reference and the different circumstances, facts, &c. brought within the compass of the terms of reference ; and frequently an error in any one branch of the description will destroy the effect of the grant, since the description cannot be made out by evidence.

When a new description is adopted, it is prudent to take the most obvious circumstances of certainty, as the foundation and ground-work of the description : thus, All that messuage, tenement, and farm,

“ called , situate in the parish of ,
“ in the county of : which said heredi-
“ taments do consist, &c. or do contain,
“ &c. and were formerly the inheritance,
“ &c. or were late in the occupation, &c.”

The advantage of adopting this mode is that the subsequent part of the description is independent of the former part of it, and therefore though the subsequent circumstances of description may be erroneous, this error will not vitiate the grant, since that which is certain of itself, cannot be destroyed by that which is uncertain, false, or insensible. And it is a general rule, that when the first and material circumstances of the description are true, a false addition does not affect the validity of the grant (*r*). The maxims are, *falsa demonstratio non nocet: nil facit error, nominis cum de persona (or de re) constat. Veritas nominis tollit errorem demonstrationis.*

When circumstances of demonstration are added to a description which is certain, the sole object is, to distinguish the particular lands from others, to which the description might otherwise apply; or to express the intention of the parties respecting the quantities, &c. or to give a history

(*r*) Bacon's Maxims, No. 13 and 25.

Shep. Touch. 246.

And see *Doe v. Greathead*, 8 East. 91.

of the deduction of the title, from owner to owner; or to connect the title under the deed in preparation, with the title under former conveyances, wills, &c.

In general, purchasers are very anxious to have a new description of the parcels they purchase, so as to adapt the description to the present circumstances of the property.

This is done in one of two modes, either,

1st, By describing the parcels by their old description, and then adding a declaration to this effect, "Which said messuages, &c. are now better known or distinguished by the several names, quantities, and other certainties herein-after mentioned, that is to say, All, &c." or, 2dly, The modern description is first inserted, and this is the more correct form; and then a declaration to this effect is added, "Which said are the same as were comprised in certain indentures, &c. and were there described as, &c." (here insert the old description.)

But this object is frequently more concisely and more neatly attained by the mode of referring to the parcels in the recitals of former conveyances: for instance, a recital that by indentures of lease and release, bearing date, &c. and made, &c. all, &c. either taking the parcels fully, with the

additional clause, " which said messuages, &c. are the same messuages, &c. as are hereinafter described, and hereby released, &c." or which is still preferable, " divers messuages, &c. therein particularly mentioned and described, being the same messuages, &c. as are hereinafter described, and hereby released, &c. or (as the circumstances require) comprising among them the messuages, &c. hereinafter described, &c."

In modern practice, schedules for the description of parcels are made, as will afterwards be noticed, the means of simplifying the form and the language of deeds.

The general rule is, that there must be a sufficient certainty of the lands conveyed, and if there be an uncertainty respecting the parcels, the deed will, as to these parcels, and so far as the uncertainty exists, be void.

The rule of law, however, is, that "*certum est quod certum reddi potest.*" For this reason it is immaterial whether this certainty be in the deed as a substantive or independent description, or depends on a reference to some other deeds, or to facts, or other circumstances: and the description may be by a reference to a description contained in other deeds, as " all those messuages, &c. which were comprised in certain indentures, bearing date, &c. and

“ thereby conveyed, &c. to and to the use
“ of, &c.”

But this is an inconvenient and objectionable mode of description, since, in order to give application to the language of the deed, and the certainty of the parcels, the deeds themselves to which the reference is made, must be produced and proved; at least in the cases of titles, depending on modern deeds.

In the case of a reference to ancient deeds, perhaps evidence that the lands have been held under the deeds to which the reference is made, would be received, without proving, or even producing the ancient deeds; and the objection does not exist when the deeds containing the reference, are indorsed on the deeds containing the description to which reference is made.

The objection also, is in a great measure, if not wholly obviated, in most instances, by a previous recital, which contains a description of the parcels, and thus as between the parties contains a positive certainty, except so far as the issue in tail, or persons in remainder may be affected by the question. On this point the observation applied to the recital of a lease for a year, in the release, will be equally relevant to any other recital. The observation of Lord Chief Justice *Holt*, applicable to this point, and it embraces a general rule, is,

“ a general recital is not an estoppel, but
“ the recital of a particular fact is (s).”

Nor is the objection of so much force when the description refers to a *fact* capable of proof, as a descent, seisin, occupation, and the like.

As often as there are various recitals in a deed, with reference to a deduction of the title to different parcels, the more simple, neat, and accurate mode is, to insert the parcels comprised in each class of deeds, in a distinct *schedule*, and to make a reference from time to time in the recital, and also in the grant to the appropriate schedule: thus the recital will be to this effect: “ Whereas, by indentures, &c. bearing date, &c. and made, &c. all, &c. which
“ are comprised and described in the first
“ schedule to these presents, with their
“ rights, members, and appurtenances, were
“ assured, &c.” Or when the circumstances require it, the recital will assume this form: “ Whereas, by indentures, &c. bearing date, &c. and made, &c. *divers here-*
“ *ditaments*, and among them, all those, &c.
“ comprised in the first schedule to these
“ presents, were assured.” And then the schedule will omit all the parcels in the recited deeds, except those which are the

(s) 1 Shower, 57.

Salter v. Kidley, cited 1 Saund. 8. Holt. 210.

1 Inst. 52.

subject of the deed under preparation. The other recitals will proceed in like manner, adapting the recital to the circumstances.

The grant will be by *words* of reference to the description in the schedules, and will be governed by the intention of the parties. In general, it will be to this effect: "All those, the messuages, &c. which are mentioned and described in the first, second, and third schedules, to these presents, and every part, &c."

In case the general words proper for the parcels in each schedule, are added in that schedule, then the reference will be to the rights, members, and appurtenances, by general words thus: after the words "every part and parcel of the same," adding "with the rights, members, and appurtenances;" but when, as more frequently happens, the general words are not inserted in the schedule, the general words should be introduced into the body of the deed, in the same manner and in the same form, as if the description of the parcels had been inserted in the body of the deed, in the clause containing the grant.

While adverting to this subject it will be proper also to notice, that sometimes the ancient description, and sometimes the modern description is, for convenience, thrown into a schedule, instead of being contained in the body of the deed. Simplicity, and a desire to keep the deed in a state to

be intelligible, with greater ease, are the objects in view ; and no persons except those who have had experience on this subject, can fully appreciate the practical convenience of these and the like arrangements. One caution, however, which is rarely observed, is deserving of notice in this place : whenever there is one description dependent on another, or connected with it, care must be taken to guard against any omission which may be found in the effective description ; and with that view, there should be added some words of reference to embrace the lands contained in the modern, or in the ancient description to which reference is made, either for identity, or for greater certainty : for instance, supposing the conveyance to be of “ all those lands heretofore described, as ,” with a reference to them, as “ now better known or distinguished by the names of ;” or the grant is of “ all those now called ; which said , were formerly described as or were formerly known by the names, &c. contained in the schedules :” in each of these instances there should be ulterior words of description, for the purpose of comprehending, as the case may require, any parcels contained in the ancient or the modern descriptions, which may not have been effectually comprised by the efficient part

of the description. Such additional clause may be in these terms, or to this effect :
“ And all other the messuages, &c. which
“ are comprised or described in the sche-
“ dules to these presents, and not herein-
“ before released or otherwise assured ;” or,
“ All other the messuages, &c. comprised
“ in the description, lastly hereinbefore
“ contained, and not hereinbefore releas-
“ ed or otherwise assured.” The neces-
sity, or at least the expediency of such
additional clause of description, arises from
the consideration, that an additional de-
scription referred to for the purposes mere-
ly of certainty or of identity, cannot give
to the terms of description, any effect be-
yond their own genuine import ; conse-
quently the circumstances of identity or
description cannot be made to comprehend
lands which are clearly and beyond all
doubt omitted.

For example, suppose three farms are
intended to be conveyed, and they are call-
ed A., B., and C., and were formerly de-
scribed as D., E., and F.; and the grant is
of all those farms called A. and B., and the
reference is, by these, or the like terms,
“ which said farms were formerly called,
“ D., E., and F.” It is obvious, that this
demonstration or addition is false ; and it
is apprehended that the false demonstra-
tion or addition, cannot extend the words

of description in the grant beyond their actual import, since it is as probable that the farm C. may have been omitted out of the grant by design, as that the farm F. may have been inserted in the enumeration of the circumstances of demonstration with an intention to include it.

In assignments of leaseholds the prevailing practice is to introduce the parcels in the recital of the lease; but in conveyances of the inheritance, it is always desirable, when the circumstances will admit of that arrangement, to introduce the description of the parcels into the operative part of the deed.

But even in conveyances in fee, particularly in re-conveyances by trustees or mortgagees, it is common to insert the parcels in the recital, and to convey them by words of reference to the description in the recital.

Trustees and mortgagees frequently object, under the advice of cautious practitioners, to convey by any other description than the identical description contained in the deeds of conveyance to them, or those under whom they claim. In such cases, it is advisable to add to that description, words to comprise lands, &c. which have become subject to the same uses, since the creation of the trust or mortgage; thus: "All messuages, &c. which by exchange,

“allotment, or otherwise, are subject at law or in equity to the uses or estates affecting the messuages, &c. hereinbefore described, or any of them.”

The observations peculiarly proper to the description of parcels in recovery deeds, will be found in the chapter on Recoveries.

When freehold and copyhold lands are intermixed, care must be taken not to include the copyhold lands in the operative part of the grant; or if they are included by general words, as parcel of a farm or close, &c. they should be expressly excepted.

In many instances, experience proves it to be impossible to distinguish the freehold from the copyhold lands, and it may happen that some of the lands to be particularly described, are of copyhold tenure, so that the exception of them would be inconsistent with the grant, and for that reason, the exception be void.

To obviate this difficulty, the grant itself should be of “All such and so many and such parts as are of freehold and not of copyhold, or customary tenure, of, and in all, &c.” adding a full description of all the parcels, including freehold and copyhold lands, or inserting such parcels in a schedule.

Sometimes the parcels are so circumstanced, particularly in cities and towns, and

in common field lands, that it is almost impossible to describe them accurately ; or if they could be accurately described, the description would run into a great and inconvenient length.

In cases of this sort, a map or plan may, with great convenience and propriety, be used or referred to, as part of the description of the parcels.

In that case, the reference to the map or plan may be made by a clause to this effect : " which said hereditaments are more particularly delineated or described in the map or plan thereof written in the margin (or according to the fact) contained in the schedule to these presents," or " in the schedule hereunder written, or hereunto annexed." In this instance also, there should be general words to comprehend all the parcels in the map, so as to embrace those parcels, if any, which may have been omitted out of the description in the grant.

Sometimes, and particularly in titles depending on terms for years, it is impossible from the confusion of boundaries, or otherwise, to shew to what parcels the description in the ancient deeds is applicable. As often as this difficulty occurs, different modes of practice are observed.

Sometimes the deed creating the lease recites the parcels fully, as in the lease ; and

the parcels which are sold, and are to be assigned are described either in the recital of the purchase deeds, or some other recital, or stated in a schedule, and the assignment will be made of "all such and so many" and such part of the hereditaments comprised in the said indentures of, &c. and "thereby demised, &c. as are comprised in the said hereinbefore recited indentures," or according to the circumstances "in the schedule hereunder written, or hereunto annexed;" or some other terms of reference adapted to the circumstances of the cases should be used.

At other times the parcels to be conveyed are described fully in the operative part of the deed; and words of qualification to this effect are added: "or such and so many and such parts, &c. of the said messuages, &c. as are comprised in the said term, and became vested in the said, &c." either by the means aforesaid, or any other means.

For a variety of forms of this sort, see the precedents to be introduced into the next volume.

In deeds of partition and settlement it is usual to have a general description in the operative part of the deeds, and a more detailed and minute description in the declaration of uses. This becomes necessary when by reason of a new arrangement of

the parcels into farms, &c. the old description is inapplicable to the allotments.

A preferable mode seems to be to allot the lands, and describe the lands in each allotment fully in a separate schedule, and to convey all the lands comprised in the schedules; and then to declare the use of the lands in the different schedules, according to the agreement of the parties; by appropriate references to those schedules.

When exchanges have taken place either under acts of parliament or under other authorities, it is common to grant the parcels by their old description, and to add an exception of all the lands which have been taken from the grantor under the allotments, and to grant by general words, or a particular description, all the lands which have been *allotted to him*.

To the particular description should be added the general words of "all messuages, &c." or "all houses, &c. or all ways, &c." adapted to the particular parcels.

And when the words of description used in the deed under preparation embrace, under a collective name, or general denomination, more lands than are intended to pass, there should be an exception of such of the lands, &c. as are not intended to be conveyed. This exception should be made by the words "excepting out of the grant, &c." hereby made, or some other words to that

effect. An exception is particularly important when there is a grant of a manor, and some of the demesnes are to remain the property of the grantor, or are to be conveyed to other persons.

The rules respecting the exception (a) are
1st. It must be to the grantor, &c. at least not to a stranger. But it is not necessary to name any person.

2dly. It must be of part of the thing granted, or of an easement, as a way, &c. and not of a thing not comprised in the grant, nor of a thing not *in esse* (b).

3dly. It must be of a *particular thing* out of property comprised under *general words*, or under a general denomination ; as a farm out of a manor ; a close out of a farm ; a room out of a house ; or the like.

For the exception of a particular thing granted by a particular name, will be repugnant to the grant, and void for that reason.

4thly. It must be of a thing capable of being severed ; and the description of the thing excepted, must be as certain as if it were to be granted (c).

After the description of the parcels the clause of all the reversion, &c. is generally added.

(a) Co. Litt. 47. a.

1 Shepp. Touchstone, 76.

(b) Difference between exception and reservation, Co. Litt. 47.

(c) Wilson v. Armourer, Sir T. Raymond, 207.

This is a formal and not a necessary clause. By a grant of lands the reversion or remainder of those lands will pass (*d*); but lands in possession will not pass by a grant of the reversion or remainder (*e*) of these lands; but a reversion will pass by the name of a remainder, or a remainder will pass by the name of a reversion (*f*).

With some gentlemen it is a practice to grant the reversion or remainder, and not the lands themselves, as often as the grantor has the reversion or remainder only. As often as this is done care should be taken that the reversion or remainder is accurately described: any important error in the description would vitiate the grant; for instance, when there is not any such reversion or remainder as that which is mentioned in the grant.

For this reason it is rarely if ever prudent to grant the reversion or remainder *eo nomine*, as the efficient part of the description.

The particular case in which it is convenient and even proper to grant the reversion or remainder *eo nomine*, is when the grantor has several estates in the same lands,

(*d*) Plowden 161.

10 Rep. 107 a. Vaughan 83.

(*e*) 10 Rep. 107 b. Vaughan 83.

(*f*) Shep. Touchstone, 84.

and he wishes to grant, as he may do (g), one of these estates, being in reversion or remainder, and to retain the other estates. To grant the lands themselves would, under these circumstances, be to grant the possession: however even when the lands themselves are granted, effect may be given to the intention by a conveyance to uses, and a proper declaration of the uses of the conveyance. But particular care is to be taken to grant the reversion or remainder only, when the learning of merger would apply and would destroy contingent remainders, contrary to the intention if several estates were granted.

When rents are to be apportioned, on account of the division of the lands out of which the rents are reserved, a clause of apportionment may be introduced in this part of the deed by a grant of a portion of the rent, and this apportionment may be introduced into the grant in these terms:—“ And
 “ also the yearly sum of £ , being that
 “ part of the yearly rent of £ reserved
 “ by the said indenture of lease, bearing
 “ date, &c. which according to an apportion-
 “ ment, agreed upon between the said
 “ (grantor and grantee) is to be received by
 “ the said grantee, his heirs and assigns, as
 “ from the day of in respect of

(g) Co. Litt. 54. b. 345. a. In the case put in Co. Litt. 345. both estates passed by force of the words *totum statum suum*.

“ the messuages, &c. hereby released,
“ or otherwise assured or intended so to be.”

Also in this part of the deed, the clause of *all the estate* (*h*) is generally added. It never should be added unless it be the intention of the grantor to pass all the estate vested in him. It should always be omitted when a particular estate only is creating (*i*).

Sometimes, particularly in assignments of leases, this clause has been the operative part of the limitation ; and the habendum, as being repugnant thereto, has been rejected (*k*). But according to the case of the *Earl of Derby*, 8 *East*. 502. the habendum may limit a particular estate, by way of under lease, notwithstanding the clause of all the estate.

The latter determination very properly construes the different parts of the deed, as amounting to a grant of all the estate, viz. all the ownership, with the qualification introduced by the habendum, viz. during the time of the particular estate to be created, and thus renders the several parts of the deed consistent.

Another clause usually added in this part of the assurance imports a grant of all the deeds, &c.

(*h*) Co. Litt. 345. a.

(*i*) See page 179 of this volume.

(*k*) *Jermyn v. Orchard*, Show. Par. Cas. 199.

There is scarcely any form which varies more than this does, in the hands of different gentlemen.

The form in the Appendix has been generally approved, and seems to ascertain the rights of the parties as between purchaser and seller, according to the general opinion and practice of the profession.—But in mortgage deeds the grant should be of all the deeds generally, and not of those only which concern the lands jointly with others of less value.

Some gentlemen omit the clause of all deeds, &c. altogether. Agreeable to the present understanding of the profession concerning the right to deeds, this clause should not be omitted.

According to the case of *Field v. Yea* (l), the deeds will belong to the grantor, if he retain any part of the lands, unless he expressly grants the deeds by words, transferring the property of them to the grantee, so as to enable him to maintain an action of detinue or trover.

For the old learning respecting deeds and the right to them, see *Buckhurst's case* (m). The particular decision in the case of *Field v. Yea*, is not easily reconcilable with those first principles of law, which flow from the

(l) 2 Durn. and East, 708.

(m) 1 Rep. 1.

rules of commutative justice, or with the particular maxim *quod meum est sine facto sive defectu meo amitti vel in alium transferri non potest*. The decision is tenable only on the ground that the property in the deeds was not fixed, but ambulatory ; leaving the property to the law of nature, *qui capit ille facit*.

Of the Habendum.

The habendum consists generally of several parts, viz.

First. An enumeration of the parcels.

Secondly. The name of the grantee.

Thirdly. The limitation of the estate intended to be granted.

Fourthly. Of words of modification or regulation.

First. The parcels are generally enumerated by words of reference. These words of reference should be sufficiently comprehensive to embrace all the parcels ; and the general words used in this part of the deed, for the purpose of enumerating the parcels, should be used throughout the deed on all occasions in which it may be necessary to refer to the parcels. In strictness, the enumeration of the parcels in the habendum is not necessary in ordinary cases. The only case in which it is necessary, is where diffe-

rent lands included in the parcels are to be granted for different estates, so that it is necessary to distinguish some of the parcels from others, as the forms in the Appendix; and even under these circumstances one habendum may introduce several lands to be held for different estates : thus to have and to hold all, &c. unto the said his heirs and assigns, viz. as to to him, his heirs and assigns for ever, and as to to him and his heirs for the life of

Secondly. The grantee ought to be named in this clause. The law will not admit of the introduction into this clause of a mere stranger as a grantee. A stranger, it is well known, may be introduced to take by way of remainder after the determination of the estate of the grantee, so as a particular estate is limited to the grantee: and although the grant be to several persons, the habendum may either sever their tenancy, or it may limit an estate to one for life or in tail with remainder to the others, or it may limit one moiety to one and the other moiety to the other. This, however, is more commonly done at this day by a declaration of the uses of the conveyance, rather than by the grant.

Thirdly. It is essential in all cases in which any other estate than for life of the grantee is to pass, that words of appropri-

ate limitation should be added to the grant; and they are properly, and when omitted in the former part of the deed necessarily, inserted in this clause. Of course to pass a fee, the word "heirs," and to pass an estate tail the words "heirs of the body," with words of procreation as "to be begotten," or the like equivalent expressions, and with such other additional words as are proper to designate heirs of a particular description when heirs of that description are intended to take, must be inserted. And when a mere estate of freehold, *pur autre vie*, is to pass, the limitation may be to the heirs or to the executors of the grantor, according to the intention of the parties. Sometimes the limitation has been to the heirs, executors, administrators and assigns. In such case it has been determined, that the heir shall take as special occupant in preference to the executor (p). But it should seem that all of an estate, *pur autre vie* would pass by a mere grant to the person, without extending the gift in terms either to the heirs or to the executors or administrators.

In creating an annuity in fee there is the peculiarity that the grantor must grant for

(p) *Atkinson v. Baker*, 4 Durnf. and East, 290.

himself and his heirs (g), to the grantee and his heirs, in order to make the annuity perpetual; for there cannot be an annuity in fee unless the heirs of the grantor are charged by the grant. These observations apply to an annuity in fee as distinguished from a rent charge in fee.

In limiting estates, *pur autre vie*, it is the more eligible way, if circumstances and the intention will admit, to limit the estate to and to the use of the grantee, his heirs, &c. rather than to make the limitation and the declaration of the use in distinct clauses. The like observation is applicable when several persons are grantees and to be tenants in common. The habendum may at once be to and to the use of the grantees, their heirs, &c. instead of a grant to them as joint-tenants by the rules of the common law, with a clause declaring the use to them as tenants in common.

Observe also, that all estates of freehold granted by a common law conveyance must, except in the instances of things created *de novo*, be granted to take effect immediately. A grant either of lands or of the reversion of lands, or of rents already created, for an estate to begin from a day to come,

(g) Co. Litt. 144. b.
1 Roll. Abr. 226.

or on an event, and which would place the freehold in abeyance, is void (r).

Fourthly. When there are several grantees, and they are to be tenants in common, then to controul the construction of law, upon the grant, words of modification for severing the tenancy must be added.

In common law conveyances, and consequently in this assurance by release, which is one of them, the words "to hold, &c. as tenants in common," either with or without words negating the joint-tenancy must be used ; but in conveyances to uses as far as respects the limitation of the use, and in wills, words of modification of less definitive import, as "equally to be divided, &c." will suffice (s).

Under this head it may with propriety be noticed, that a person who has the fee has the utmost extent of interest of which he is capable ; and his estate doth not admit of any increase or enlargement. It may be determinable or defeasible, and these qualities may be discharged by a release. Such release operates by way of extinguishment of right or title, and not a release in en-

(r) Essay on Est. Chap. "Freehold."

(s) Fisher v. Wigg, 1 Peere Will. 14.

Rigden v. Vallier, 2 Ves. 252. but see Cases and Opinions, Vol. 2. 279.

Wilkes, 180, 2 Bro. C. C. 233. 3 T. Rep. 765.

largement of a prior estate. When an instrument operates as a release by way of enlargement, it *transfers* an estate ; it passes a seisin : in short, it is a *conveyance* ; and hence the practice that uses may be and are continually declared of a seisin transferred by this assurance ; but no use can be declared on a release of right or title, or of a possibility ; and of this description is a release of the determinable or defeasible quality of an estate in fee. There is one species of fee, however, which, as already noticed, admits [of enlargement. This is the particular case of an estate tail converted into a base or determinable fee. In this instance, the base or determinable fee may be in one person, and an actual estate may be in another person ; and on principle, this fee or particular estate may be enlarged by the accession of the remainder, or reversion in fee, which confers the ulterior interest : for there is an estate to be added, and that estate is in legal denomination larger than this base or determinable fee ; and by the union of the two interests, the ownership under the determinable fee may merge in the absolute fee. This case is an exception to a general rule, that one fee cannot be dependant or expectant on another fee. That rule is universally true, when understood with the qualification, that one fee cannot, by the *grant* of the

party be expectant on another fee. The conversion of an estate tail into a base fee, is merely a consequence or conclusion of law. The material difference is where a man grants an estate to another and his heirs, determinable in any manner, he retains merely a possibility of reverter. This possibility may be released to the person who has the determinable fee, but it does not admit of being granted: on the other hand, an actual reversion or remainder, though expectant on a base fee, derived from an estate tail, confers an interest, which may be granted from one person to another; and for that reason may be released to the person who has the prior estate in fee. No doubt is entertained, that even when there is a determinable fee, an instrument in the form of a lease and release would operate by way of release of the possibility. The case is noticed only for the sake of a distinction, and to illustrate the general principles which govern the assurance by lease and release, as a conveyance admitting of uses to be executed into estate, under the statute for transferring uses into possession.

Of the Declaration of Use.

As this species of assurance passes an estate at the common law, it admits of a declaration of use, and the use should ab-

ways be framed so as to express the intention of the parties. The uses thus flowing from and governed by the intention of the parties, vary so materially in every instrument, that it will be more proper to consider the uses to be introduced in each instrument, in treating of that instrument, under the different heads of purchase deeds, and the like, than to detain the reader with a discussion of the subject in this chapter.

However, the general observations suggesting themselves on the circumstances which render it necessary to resort to a conveyance to uses, because the intention cannot be accomplished by a conveyance at the common law without uses, will form an useful part of this work, and will be introduced into this chapter.

The declaration of uses generally, though not necessarily, follows the habendum. Sometimes there are several clauses of habendum, and there will be one entire declaration of use of the several estates passing by each distinct habendum. Sometimes also the uses are declared distinctly as to different parts of the lands, and frequently the clause declaratory of the use, finds its place in some other part of the deed, than the clause immediately following the habendum. Within the whole scope of the learning, more peculiarly belonging to the province of the conveyancer, none is more important to be known than that which concerns the doctrine of

uses : for there are many things which may be done through the medium of a conveyance to uses, which cannot be accomplished by a conveyance merely and simply at the common law ; consequently there are many instances in which it is absolutely necessary to resort to the learning of uses, in framing a conveyance.

The following observations will give a general outline of the more useful points arising out of this important learning.

First. No one can take immediately under a grant, unless he be named as the grantee ; and, as a consequence, a child unborn cannot take the first estate limited by the grant ; because he is not capable of being the grantee, or of immediate livery. But a conveyance may be made to one person to the use of another person, and a child unborn may be the first *cestui que use*.

Secondly. A man and his wife are considered in law as the same person, and from the legal unity of their persons, a grant from a man to a woman, being his wife, is void. But a grant by a man to another person to the use of his wife is good : so a devise by a man to his wife is good, since a will does not operate with effect until the death of the testator.

Thirdly. A man cannot, at the common law, make a grant of an estate of freehold to commence *in futuro* ; but he can convey the land immediately to an use which

is to give an estate of freehold to commence *in futuro*.

Fourthly. A man cannot make a grant at the common law, reserving to himself a particular estate as an estate for years, for life, or in tail ; but a conveyance may be made to a man to uses under which he may limit to his own use an estate for years, for life, or in tail ; and if he declare some uses, but leaves an interval for the precise period of his life, the use will result to him for that period.

Fifthly. At the common law, a man cannot grant an estate, reserving to himself a power over that estate. All he can do is to annex a condition to defeat that estate, so as to restore himself by the operation of the condition to his own ownership ; but a conveyance may be made to uses ; and under these uses the former owner may reserve to himself a power of revocation, which in some degree partakes of the nature of a condition ; or he may reserve a power of new appointment ; and under the latter power he may defeat, either wholly or partially, the use limited in favor of other persons.

Sixthly. On a conveyance at the common law, the estate cannot be defeated by any other means than a condition ; and no one except the grantor or his representatives, or in some cases by statute law, the assignee, having the reversion after a parti-

cular estate, can take advantage of the condition ; but through the medium of a conveyance to uses, powers of revocation and of new appointment may be given, either to the grantor or a stranger ; and these powers, when exercised, will defeat the estates previously limited, as far as the estates shall be affected by the revocation or new appointment.

Seventhly. A condition, except when annexed to a lease for years, must defeat the entire estate to which it is annexed ; but a power under a conveyance to uses may not only defeat the estate to which it is annexed, but it may abridge or postpone the same, or introduce a particular estate in derogation to the former estate, so as to defeat that estate partially, as in the instances of powers of leasing, jointuring, &c. and appointments in exercise of that power.

Eighthly. No one taking an estate by grant at the common law, can by rightful alienation confer a title for a longer time than the continuance of his own estate ; but under uses in a conveyance, the owner of a particular estate may have a power which will enable him to confer the right of enjoyment after the determination of his own estate, as in the common case of estates for life, with powers of leasing, jointuring, &c.

Ninthly. By the rules of the common law, several persons, taking, at *different*

times, on account of their coming *in esse* at different periods, must necessarily take as tenants in common. See Justice *Windham's case*, 5 *Coke*. But under a conveyance to uses, several *cestuis que use*, taking at several times, because they come *in esse* at different periods, may take as jointenants, and the estate will vest in those, who first come *in esse*, subject to open and devest, when others come *in esse*. This rule also extends to wills.

Tenthly. By the rules of the common law, estates, to give rights of enjoyments to different persons in succession, must be limited by way of particular estates and remainders dependant thereon, and no estate can be limited with effect, in derogation or abridgment of a prior estate; but under a conveyance to uses, one estate may be limited, in derogation or in abridgement of another estate, or so as to defeat the same, as in the common case of springing, future, or executory uses, under powers of leasing and jointuring, powers of revocation and new appointment, powers of sale and exchange, provisoes of cesser, and powers for shifting the estate on refusal to change the name, or on the accession to an estate, &c. Also an estate may, in a conveyance to uses, be limited by way of interpolation, so as to divide or separate two estates which were before immediately expectant, one on the

other, as in the example of an estate for life limited by way of jointure, between the estates of A. tenant for life, with remainder to B. in tail.

Eleventhly. By the rules of the common law, one fee cannot be limited after or dependant on another fee ; or more generally speaking, no estate can be limited after and dependant on a fee previously limited ; but in a conveyance to uses, a fee may be limited to one person : and on a given event to happen within the rule prescribed against perpetuities, the fee, or a particular estate, may be limited to another person ; as in the common case of settlements to the use of one, and his heirs, till marriage, and afterwards to other persons ; and also the common case of a limitation to the use of several persons in fee, with limitations over to take effect eventually either as between themselves or in favor of strangers. And it follows, that in all these, and the like cases, it is necessary to resort to a conveyance to uses to give effect to the intention of the parties, if that intention is to be accomplished immediately, without resorting to any circuitous mode ; as a conveyance upon trust, which requires another conveyance ; or the ancient practice of a conveyance, subject to a condition which will revest the estate in the grantor. As a general observation, to be understood, perhaps, with some

qualifications, it may be noticed, that any mode of limitation warranted by a declaration of uses in a conveyance, may be introduced into a will. The like observation, as is afterwards noticed, applies to limitations of trust.

Many objects also, as the introduction of powers, &c. &c. may be accomplished through the medium of a conveyance to uses, which cannot be accomplished, or cannot be accomplished with equal certainty and effect, by a bargain and sale, or covenant to stand seized to uses, being assurances depending on contract and giving uses without the aid of a conveyance. Fines and recoveries with declarations of use, are, in effect and in construction, conveyances to uses. The fine, in one case, and the recovery, in the other case, is the conveyance.

Having now stated the different circumstances under which it is necessary to resort to a conveyance to uses to give effect to the intention of the parties, because the same cannot be accomplished through the medium of a conveyance simply at common law ; several points relevant to the doctrine of uses, and necessary to be observed in preparing conveyances to uses shall be noticed.

First. There must be a seisin to serve or supply the use, for unless there be an estate to serve the use, no use can arise to be exe-

cuted by the statute ; consequently no use can arise from an ownership, which is merely equitable, or from a chattel interest, or an estate in lands, held by copy of court call. Again, one man cannot covenant that another shall stand seized to an use ; also the same person cannot be merely and simply the owner, and also the *cestui que use*. It follows, that a conveyance by A. to B. in fee to the use of B. in fee, will give the fee to B. at the common law ; for there is not any use distinct from the seisin, or rather because the seisin of B. includes the use. So if a lease be made to A. to the use of A. for the lives of himself and two others, this declaration of the use is, in truth, part of the limitation. So if a conveyance be made to A. in fee to such uses as A. shall appoint, and in default of appointment to A. in fee, these uses are void, since there is not any seisin to supply them, or rather because A. cannot be merely and simply a trustee for himself ; but a conveyance to A. in fee to the use of B. for life, remainder to A. in fee, is a conveyance to uses for the purpose of raising the estate for life to B. ; and B. will be seized by force of the statute of uses, while the remainder of A. being his ownership under the conveyance, will be a seisin by the common law, subject to the estate for life. See *Bacon on Uses*, and *Essay on Estates*. Again, a conveyance to A. in fee

to such uses as B. shall appoint, and in default of appointment to the use of B. in fee, is a conveyance to uses operating on or to arise from the seisin of A. : and B. may at the same time have a power, and also the fee subject to the power. This was decided in Sir *Edward Clere's case* (t); a case distinguishable from the modern case of *Goodill v. Brigham*. In that case, properly understood, for it has not always been correctly understood, the power of the wife was bad, because there was not any power distinct from the seisin ; and the case turned on the ground, that the wife had merely a *seisin at the common law*; and at the common law, the same person cannot have the fee, and also a power over the fee.

Secondly. A use cannot in the same conveyance, be declared of a seisin, which is executed by force of the statute of uses, for the statute executes only the use in the first degree. Thus, no use can be declared on the seisin of a bargainee or of an appointee of a use, because the appointee or the bargainee has merely a use ; and the ulterior use declared of his estate is merely a use on a use, and therefore a trust not executed by the statute of uses. Thus, when

(t) 6 Rep.

1 Bos. and Pul. 192.

a bargain and sale is made to A. in fee to the use of B. in fee, A. the bargainee has merely a use, and the use declared in favor of B. is a use in the second degree, or merely a use on a use, and for that reason a trust. So, if an appointment under a power in a conveyance to uses, as distinguished from an appointment under a common law authority in a will, or an authority in an act of parliament, be made to A. in fee to uses, the appointee will have an use, and all the ulterior uses declared of A.'s estate are uses in the second degree, and therefore trusts not executed by the statute ; but though a bargain and sale may not be made to a use declared of the estate of the bargainee ; yet if a bargain and sale shall be made to the intent that a common recovery may be suffered to uses, these uses, though in a bargain and sale, will be executed by the statute, because they are to arise on the seisin of the recoveror, and not on the seisin of the bargainee.

These observations also must be confined to bargains and sales of the use and appointments under powers in conveyances to uses ; for if an appointment or a bargain and sale be made under an authority in a will not being a power to appoint to uses, or under an authority given by act of parliament, the bargainee or appointee will be seized by the rules of the common law, and then no

objection exists against declaring an use under his seisin, and to be executed by the statute of uses : nor does the rule apply to new contracts by the bargainee or appointee, &c. after his seisin shall be complete. For though a man derives his title by means of an use executed by the statute, he may by a new bargain and sale, or covenant to stand seized, &c. as well as by a conveyance at the common law raise a new use on that seisin thus perfected in him.

Another rule is, that the estate arising from a declaration of use cannot be more extensive than the estate out of which it is supplied (*v*).

The best advice to be offered to the reader, is to pursue this important subject in the books which have been written concerning uses, beginning with *Mr. Cruise*, then reading *Mr. Sanders's* more detailed work ; next *Mr. Butler's* excellent note in *Co. Litt*, on Uses and Trusts ; then *Bacon's* Reading on the Statute of 27 *Hen.* 8. and finally *Mr. Sugden's* masterly performance on Powers. To the author of these observations, nothing is more gratifying than to recommend these works to the careful perusal and attention of the profession.

(*v*) *Dyer*, 186.

Of resulting Uses.

In this place, it should be observed, that when the release is to a man and his heirs, to the use of him and his heirs, the releasee will be seized under *the rules* of the common law, since he has the seisin at the common law, and the use gives him nothing more or less than he had before (*u*). So if the use be declared in favor of different persons of particular estates, and the ultimate fee be limited to the releasee, he will be seized by the rules of the common law (*w*). But if a particular estate be limited to the use of the releasee, either for life or in tail, this use will be executed by the statute, and consequently he will be seized of that estate, through the medium of the statute.

Sometimes also the declaration of use is considered as part of the limitation of the estate, as in the case of a grant by A. to B. and his heirs, to the use of B. and his heirs, for the lives of A. and B. without further limitation of use; for in this case the grantee will be seized at the common law, and consequently the use forms part of the limitation of the estate (*x*). But if the grant had

(*u*) Bacon on Uses, 63. Essay on Estates, Introductory Chapt.

(*w*) Jenkins v. Young, Cro. Car. 230.

Bacon on Uses, 64, c. *ib*.

(*x*) Jenkins v. Young, Cro. Car. 230. 244.

been made to one person, and the use had been limited to another person, the use, as distinct from the conveyance, would have been effectual only under the learning of uses.

Doubts have been entertained, whether in case of an omission of the declaration of use in the release, the use will result to the releasor, or whether it will remain in the releasee, even though there be no consideration, except a nominal one of five shillings. See *Shortridge v. Lamplugh* (y). In that case, the decision was against the resulting use; but *Lord Ch. J. Holt* admitted, that there might be a resulting use on a release.

It is quite clear, that if the release be made for a valuable consideration, or for any purpose which requires that the seisin should remain in the releasee; as to the intent, that a common recovery should be suffered; there would not be any resulting use. And it is equally clear, that in all cases a resulting use may be rebutted by internal or external evidence, which shews that the releasee was to be the beneficial owner. But if particular uses are declared, and the fee is left undisposed of, the fee will result to the grantor (z). So if the use of the fee be

(y) 2 Salk. 678.

(z) Co. Litt. 23.

Lord Raymond, 802.

limited to the former owner, he will be in of his old use, that is, of a new estate and not the old estate ; but this new estate will be descendible in the same manner as the old estate was descendible, and is in law treated as the *old use*.

But if the grantor takes a particular estate for life, or in fee tail, or if he takes a fee differently modified, as an estate to him and his heirs till marriage ; or a fee liable to be defeated by a shifting use ; this will be an estate of which he will be considered as the purchasing ancestor, and it will be descendible though a fee, without regard to the descendible quality of the old use. Every will implies a gift, and therefore on a gift by will, no use will arise by implication (*a*). An use may be declared in express terms (*b*) ; and that use will be executed into estate, although the Statute of Uses was passed prior to the Statute of 32 *Hen.* 8. which authorises dispositions by will (*c*).

So every gift of a *particular* estate implies a consideration : it creates a service, and therefore no use will result on the gift of a particular estate (*d*) ; and yet an express use may be declared on the gift of a parti-

(*a*) Bro. Feoff. al Use, p. 10.

(*b*) Co. Litt.

(*c*) Butler's Co. Litt.

(*d*) Perk. 1. 535. Dyer, 146. Cruise's Dig. Use, 652.

cular estate. So if the grantee of a particular estate assign his estate, no use will result to him at law. In equity, circumstances may justify the court to declare that there is a resulting trust (e).

Of Trusts.

So also trusts may be, and frequently are declared in this instrument ; and these trusts must depend on the intention of the parties. Every modification of ownership, which is admissible under the learning of uses, is admissible under the learning of trusts ; for most trusts are uses, but so circumstanced, that they cannot be executed into estate under the statute. The general rule, that an use cannot be limited on an use ; in other words, that an use in the second degree, cannot be executed into estate, is the cause, that many trusts, though uses in effect, are not executed by the statute. Thus, under a conveyance to A. in fee, to the use of A. in fee, in trust for B. and his heirs, or to and to the use of A. in fee, in trust for B. and his heirs ; the beneficial ownership, in effect the use, will be in B. and yet the statute will not execute

(e) *Castle v. Dod*, Cro.Ja. 200.

that use. An impediment arises from the use declared in favor of A. though A. is to be merely a trustee. This point has been more fully discussed in a former division. At present, it will suffice to notice, that the release should never be made to the use of the releasee, when the intention is to declare, on his seisin, uses to be executed into estate, in favor of other persons under the statute of uses.

Of Covenants.

It remains only to be observed, that the deed should contain such covenants for title as are adapted to the circumstances of the case, and the intention of the parties.

APPENDIX.

FORM I.

Covenant to levy a Fine. The most simple Form.

THIS INDENTURE, made the day
 of in the year of the reign of our
 sovereign George the 3d. &c. and in the year of
 our Lord BETWEEN A. B. of, &c. of the
 one part, and C. D. of, &c. of the other part,
WITNESSETH that it is hereby declared and agreed
 by and between the parties to these presents, and
 the said A. B. for himself, his heirs, executors,
 and administrators, doth hereby covenant and
 agree with the said C. D., his heirs and assigns,
 in manner following, (that is to say) that he the
 said A. B. shall or will at his own proper costs
 and charges as of Trinity Term now last past, or
 in, or as, and before the end of Michaelmas Term
 now next ensuing, acknowledge and levy unto
 the said C. D. and his heirs, before his Majesty's
 justices of the Court of Common Pleas at West-
 minster, one or more fine or fines, *sur conuzance*
de droit come ceo, &c. with proclamations ac-
 cording to the form of the statutes in that behalf
 made and provided, and to be engrossed and re-

corded according to the order and course of fines in such cases used and accustomed, of ALL (*parcels fully*) (*and general words*) AND ALSO of all other the messuages, lands, tenements, and hereditaments, which by the said , &c. were , &c. together with their rights, members, and appurtenances, by the names and descriptions of four messuages, six cottages, one toft, six barns, two dovecoats, seven gardens, six orchards, five hundred acres of land, sixty acres of meadow, seven hundred acres of pasture, and fifty acres of furze and heath, with the appurtenances, in Rudston, and the parish of, &c. or by such other apt, proper, and convenient names, number of messuages, and acres, quantities, qualities, and other descriptions as shall be sufficient to comprise the same. AND it is hereby agreed, by and between the parties to these presents, that the fine or fines so as aforesaid, or in any other manner, or at any other time or times, levied or to be levied, AND ALL and every other fine or fines, common recovery or recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter acknowledged, levied, suffered, made and executed, of and concerning the said messuages and hereditaments respectively, or any of them, either alone or jointly with any other lands, tenements, and hereditaments, by or between the said parties to these presents, or any of them, either alone or jointly, and together with any other person or persons whomsoever, or to which they or either of them is or are, or shall or may be parties or privies, or party or privy, shall be

and enure, and was and were meant and intended, and is and are hereby directed and declared to be and enure, and the conuzee or conuzees named and to be named in the said fine or fines, and every of them, and his and their heirs, and all and every other person or persons respectively, to whom the said fine or fines, recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be acknowledged, levied, made and executed, shall severally and respectively stand and be seised, As to, for and concerning all and singular the said messuages, lands, and hereditaments, with their rights, members, and appurtenances, *To the use* of the said A. B. his heirs and assigns for ever (a), and to no other use whatsoever. *In witness, &c.*

(a) The uses will be varied according to the circumstances: and there should be recitals and special forms in the testatum clause only when circumstances require specification of a particular intention.

acquit, release, and discharge the said J. M. his heirs, executors and administrators; it is hereby directed, declared, and agreed, by and between the said parties to these presents, as far as they respectively are interested, that a certain fine, *sur conuzance de droit come ceo, &c.* levied by the said R. P. and Catherine his wife, unto the said H. K. and his heirs, of the orchard, close, and hereditaments, hereinafter described, among other hereditaments by the names and descriptions of one messuage, &c. with the appurtenances, &c. in Hilary term now last past, and recorded or intended to be recorded as of Hilary term now last past, and all other fines levied or to be levied by the said R. P. and Catherine his wife, or either of them, shall as, to, for, and concerning all that orchard, and one close, late two closes of land, situate, lying, and being, at or in W. in the said parish of S. with the appurtenances; (which said orchard doth occupy a scite of 1 A. 1 R. 12 P. including the hedges thereunto belonging; and which said close doth occupy a scite of 2 A. 2 R. 19 P. including the hedges thereunto belonging,) being a close and hereditament which were formerly purchased by J. P. gentleman, who died intestate, of and from W. W. and H. W. Esq. or one of them, in the year 1741, and the same descended to R. P. his eldest son, who devised the same to the said R. P. party hereto, his heirs and assigns for ever, subject to a life estate to the Rev. J. P. the brother of the said R. P. deceased, (being an estate determined by his death,) and also subject to an annuity to J. P. his brother (being an annuity which is determined by his death,) and which

proved :
on or
rt a
h

right e.

whatsoever, open.

Declar

use of the said J. M.

for ever : And the said R. P.

having agreed to enter into general
for title, therefore the said R. P. doth
hereby for himself, his heirs, executors, and admin-
istrators, covenant with the said J. M. his heirs
and assigns that he the said R. P. party hereto
is now seised to him and his heirs, of an absolute
estate of inheritance in fee-simple, of and in the
said orchard, close, and hereditaments, herein-
before described, and every part of the same,
with the appurtenances, without any condition,
trust, power of revocation, or of limitation to
use or uses, or any other power, restraint, cause,
matter, or thing whatsoever, to defeat, make void,
lessen, or incumber the same estate, or any part
thereof ; and also that they the said R. P. party
hereto, and Catherine his wife, now have in them-
selves good right, full power, and lawful and
absolute authority by these presents, and the
fine hereinbefore mentioned, to grant and con-
firm the same orchard, close, and hereditaments
hereinbefore described, and every part of the
same, with the appurtenances unto and to the
use of the said J. M. his heirs and assigns for

over ;

M.

ast

III.

art of

to receive

hereof, without

ejection, interruptio

a Fine.

or by him the said R.

heirs, or any other person

and free from all incumbrances

done, committed, occasioned, per

ferred by the said R. P. party hereto, of, &c.

son or persons whomsoever; AND FURTHER

that the said R. P. party hereto, and his heirs, and

and all persons lawfully or equitably and right

fully claiming any estate or interest in or to the

said close, orchard, and hereditaments herein

before described, or any part thereof, shall and

will from time to time and at all times hereafter

upon every reasonable request, and at the costs

and charges in all things of the said J. M. his

heirs and assigns, make, do, acknowledge, levy,

suffer, execute, and perfect, or cause or procure to

be made, done, acknowledged, levied, suffered,

executed, and perfected all such further and other

lawful and reasonable acts, deeds, conveyances,

and assurances in the law whatsoever, for fur

ther, better, more perfectly, lawfully, and abso

lutely, or satisfactorily granting, limiting, releas

ing, confirming, or otherwise assuring the said

close, orchard, and hereditaments, hereinbefore

described, and every part of the same, with the appurtenances, unto and to the use of the said J. M. his heirs and assigns for ever, according to the true intent and meaning of these presents, as by the said J. M. his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required, and be tendered to be made, done, and executed. IN WITNESS, &c.

FORM III.

Declaration of the Uses of a Fine.

THIS INDENTURE, of three parts, made the day of 51st Geo. III. and in the year of our Lord 1811, between J. D. of, &c. and Joan his wife, R. D. of, &c. and Susannah his wife, J. D. of, &c. and R. D. of, &c. of the first part; J. B. of, &c. of the second part; and C. D. of, &c. of the third part. WHEREAS the said R. D. and Susannah his wife, J. D. and Joan his wife, J. D. and R. D. have acknowledged and levied, or intend forthwith to acknowledge and levy to the said J. B. and his heirs, one fine *sur conuzance de droit come ceo*, &c. of divers hereditaments in the county of Somerset, and among and together with other hereditaments which have been purchased by the said J. B. and have been or are intended to be conveyed to uses for the benefit of the said J. B. his heirs, appointees, and assigns, all, &c. (*describe the parcels fully*) with their and every of their rights, members, and appurtenances, which said closes, lands, and hereditaments, at the time of levying the said fine, stood limited to the use of the said J. D. her heirs and assigns, for ever. AND WHEREAS no uses have been declared of the said fine, so

far as the same relates to, or comprises the said closes, lands, and hereditaments, described in the recitals hereinbefore contained. **AND WHEREAS** the said J. D. is desirous that the same closes, lands, and hereditaments, should henceforth be and become the inheritance of the said J. D. her husband, and be settled to the uses, upon the trusts, and for the ends, intents, and purposes, for his benefit, which are hereinafter limited, expected, declared, and contained, of and concerning the same; and the said R. D. and Susannah his wife, J. D. and R. D. who joined in the said fine, in respect of the hereditaments purchased by the said J. B. have at the request of the said J. D. and Joan his wife, and for the purpose of conformity, agreed to join in the declaration hereinafter contained, of the uses of the said fine, as to the closes and hereditaments described in the recitals hereinbefore contained: **NOW THIS INDENTURE WITNESSETH**, and it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested in the closes and hereditaments mentioned or described in the recitals hereinbefore contained, and they hereby severally and respectively direct and appoint that the fine so as aforesaid, or in any other manner, or at any other time or times to be acknowledged and levied, and also all and every fine and fines, common recovery and common recoveries and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter acknowledged, levied, suffered, made, and executed, of the said closes, lands, and hereditaments, comprised and described in the reci-

tals hereinbefore contained, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever, by or between the said parties to these presents, or any of them, either alone or jointly and together with any other person or persons whomsoever, or to which they or any or either of them is or are, or shall or may be parties or privies, or party or privy, shall be and enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant, intended, and is and are hereby directed and declared to be and enure; and that the person or persons to whom the said fine or fines, common recovery or recoveries, or other assurances respectively, have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be seised as to, for, and concerning the said closes, lands, and hereditaments, mentioned and described in the recitals hereinbefore contained, and every part and parcel of the same, with the appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, hereinafter limited, expressed, declared, and contained, of and concerning the same, that is to say, (*here follow uses to prevent dower.*) IN WITNESS, &c.

FORM IV.

Feoffment made to gain the Freehold by Disseisin.

THIS INDENTURE, made, &c. between J. C. of, &c. and M. his wife, of the one part, and A. B. of, &c. of the other part; WHEREAS the said J. C. is desirous of making a feoffment and levying a fine of the messuage or tenement, yard, garden, and hereditaments, hereinafter described, and also granted and enfeoffed, or otherwise assured or intended so to be, and of limiting the same messuage, &c. to the uses hereinafter expressed and declared concerning the same; and the said M. the wife of the said J. C. hath agreed to join with him in levying a fine of the same messuage, &c. and hereditaments: NOW THIS INDENTURE WITNESSETH, that for the purposes hereinbefore expressed, and in consideration of ten shillings of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said J. C. well and truly paid by the said A. B. before the execution of these presents, the receipt whereof is hereby acknowledged; the said J. C. hath given, granted, enfeoffed, and confirmed, and by these presents *doth* give, grant, enfeoff, and confirm unto the said A. B. his heirs

and assigns, *ALL, &c. (the parcels and the appropriate general words—and the reversion, &c.)* To HAVE AND TO HOLD the said messuage, or tenement, yard, garden, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances, unto the said A. B. his heirs and assigns for ever ; To THE USE, &c. (*uses to prevent dower. Covenant to levy a fine, with a declaration that the same shall operate.*) To THE USES, upon the trusts, and for the ends, intents, and purposes hereinbefore limited, expressed, and declared, of and concerning the same, in confirmation of these presents, and for the purpose of giving more complete effect to the same. IN WITNESS, &c.

Observation.

There must be a letter of attorney from the feoffor, if absent, to give livery, and from the feoffee, if absent, to receive livery ; the feoffor by himself or his attorney should enter in the house, and claim the same as his inheritance : all other persons should thereupon quit the same : afterwards he should deliver the deed prepared from this draft, and then taking the key of the house, deliver the key to the feoffee, in the name of seisin and as seisin of the house and premises, with the appurtenances, to the feoffee, his heirs and assigns, according to the form and effect of the deed. On the deed there should be indorsed a memorandum of the transaction in these words, or to this effect :—

Memorandum—That on the day and year first within written, the within named J. C. did enter

upon and take possession of the messuage, or tenement, yard, garden, and hereditaments, described in the within written indenture, and thereby granted and enfeoffed, or expressed so to be, and claimed the same as his inheritance, and having taken possession and seisin thereof, as aforesaid, did make livery of seisin of the same messuage, &c. to the within named A. B. to have and to hold to the said A. B. his heirs and assigns, according to the form and effect of the within written indenture.

N. B. If livery is given or received by attorney, the fact should be so stated.

FORM V.

Feoffment and Covenant to levy a Fine.

THIS INDENTURE, of five parts, made, &c. between J. L. of, &c. and Sarah his wife, of the first part ; G. S. of, &c. and Frances his wife, of the second part ; T. L. of, &c. of the third part ; J. F. of, &c. and B. W. of, &c. of the fourth part ; and J. J. A. of, &c. and W. W. the younger, of, &c. of the fifth part. WHEREAS the said J. L. is seised to him and his heirs in fee-simple (subject to the title of dower of the said Sarah his wife) of five-eighth parts of the manor, messuages, lands, and hereditaments, hereinafter enfeoffed, or otherwise assured, or intended so to be, and the said G. S. is seised to him and his heirs in fee-simple, subject to the title of dower of the said Frances his wife, of the remaining three-eighth parts of the same manor, messuages, lands, and hereditaments. AND WHEREAS the said manor, messuages, lands, and hereditaments, have been lately sold in lots to several persons ; and for the purpose of bringing the evidence of title to the same manor and hereditaments into a narrow compass, and for extinguishing all dower, right and title of dower, of the said S. L. and F. S. it hath been advised, determined, and agreed, that a feoffment should be

made, and a fine levied of the same manor, messuages, lands, and hereditaments, and such uses declared thereof as are hereinafter mentioned; Now THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of ten shillings of lawful money current in Great Britain to each of them the said J. L. and Sarah his wife, G. T. and Frances his wife, well and truly paid by the said T. L. immediately before the execution of these presents, the receipt whereof is hereby acknowledged, they the said J. L. and Sarah his wife, G. S. and Frances his wife, according to their respective shares, estates, and interests, in the manor and hereditaments, *have*, and each and every of them *hath* given, granted, and enfeoffed, and by these presents, *do*, and each and every of them *doth*, give, grant, and enfeoff, unto the said T. L. his heirs and assigns for ever, ALL, &c. *parcels fully*, and all and singular messuages, &c. and all other the manor or reputed manor, messuages, lands, tenements, and hereditaments, and parts and shares of manors, messuages, lands, tenements, and hereditaments, of them the said J. L. and G. S. and each or either of them, situate, lying, and being, in the parish of F. in the said county of O. and every part and parcel of the same, with their and every of their rights, members, and appurtenances, and the reversion, &c. and all the estate, &c. To HAVE AND TO HOLD the said manor, messuages, lands, tenements, and hereditaments, and all and singular other the premises hereby granted and enfeoffed, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and

appurtenances, unto the said T. L. his heirs and assigns for ever, to the use of the said T. L. his heirs and assigns for ever, upon the trusts herein-after expressed and declared, of and concerning the same, (that is to say) as, to, for, and concerning those five undivided eighth parts thereof, now or late of the said J. L. (the said manor and hereditaments being considered as in eight equal parts or shares to be divided), in trust for the said J. L. his heirs and assigns for ever, and as, to, for, and concerning the remaining three undivided eighth parts thereof, the whole in eight equal parts to be divided, in trust, for the said G. S. his heirs and assigns for ever. *And* the said J. L. doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the five-eighth parts of the said J. L. of and in the said manor, &c. hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself, and his said wife, *relating to the same parts or shares.* *AND* the said G. S. doth, &c. covenant with the said T. L. his heirs, &c. [*here add covenant to levy a fine sur conuzance de droit come ceo and so forth (common form) with a declaration to enure*] TO THE USES, upon the trusts, and for the ends, intents, and purposes, hereinbefore limited, expressed, declared, and contained, of and concerning the same, in confirmation of these precepts, and for giving more full and complete effect to the same. *And* the said J. L. and Sarah his wife, G. S. and Frances his wife, &c. (*letter of attorney to deliver possession in common form,*) and the said T. L. &c. (*letter of attorney to receive possession in common form.*) IN WITNESS, &c.

FORM VI.

*Demise of Term for Years, by Way of Mortgage,
being an Underlease, by a Trustee, of atten-
dant Terms, and a Confirmation and Lease
by the Reversioner.*

THIS INDENTURE, of three parts, made
the day of 55 Geo. III. A. D.
1815, BETWEEN R. J. of, &c. of the first part;
B. C. W. of, &c. of the second part; and S. R.
of, &c. of the third part: WHEREAS the said R. J.
is seised to him and his heirs, in fee simple of the
messuage, farm, and lands, hereby bargained, sold,
and demised, or otherwise assured, or intended so
to be, with their rights, members, and appurte-
nances, subject, nevertheless, to one or more term
or terms for years now vested in the said B. C. W.
as a trustee for the said R. J. and to attend the
inheritance of the same messuage, farm, lands,
and hereditaments; AND WHEREAS, on the ap-
plication, and at the instance and request of the
said R. J. the said S. R. hath agreed to advance
and lend to the said R. J. the sum of three thou-
sand pounds at interest, on the security made by
these presents, and the bond of the said R. J.
hereinafter mentioned. And the said B. C. W. on
the application of the said R. J. hath consented

and agreed to execute these presents for the purpose of giving effect to the demise hereinafter contained, and made by him *the said R. J.* Now **THIS INDENTURE WITNESSETH**, that in pursuance of the said agreement, and also in consideration of three thousand pounds, of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain to the said R. J. advanced and lent by the said S. R. the receipt of which said sum of three thousand pounds, the said R. J. doth hereby acknowledge, and of and from the same sum, and every part thereof, doth acquit, release, and discharge the said S. R. his heirs, executors, administrators, and assigns for ever, by these presents; and in consideration of ten shillings, of like lawful money, to the said B. C. W. also paid by the said S. R. the receipt whereof is hereby acknowledged, he the said B. C. W. at the instance and request, and by the direction and appointment of the said R. J. and by way of demise, or other assurance, and not of covenant, or warranty, *hath* demised, leased, and to farm let, and by these presents, *doth* demise, lease, and to farm let, and the said R. J. *hath* granted, bargained, sold, demised, ratified, and confirmed, and by these presents *doth* grant, bargain, sell, demise, ratify, and confirm, to the said S. R. his executors, administrators, and assigns, **ALL** that messuage, farm, and lands, commonly called, known, and distinguished by the name of P. in the county of G. which said messuage, farm, and hereditaments, are now in the tenure or occupation of J. J. farmer, at the yearly rent of £ . . . or some such rent; **AND** all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards,

closes of land, meadow, and pasture feedings, woods, underwoods, and the ground and soil thereof, common and commons of pasture and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever, to the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any of them respectively belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel, or member of the same, or any of them respectively, AND the reversion and reversions, remainder and remainders, yearly and other rents and profits, of the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, (*add grant of deeds;*) TO HAVE AND TO HOLD the said messuage, farm, lands, hereditaments, and all and singular the premises, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their, and every of their rights, members, and appurtenances, unto the said S. R. his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term or time of two hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste, subject nevertheless to the proviso or agreement for redemption hereinafter contained, *yielding and pay-*

ing for the same messuage and hereditaments, yearly and every year, during the said term, hereby granted, the rent of one pepper corn, if the same rent should be lawfully demanded; PROVIDED ALWAYS and it is hereby declared and agreed by and between the parties to these presents, as far as they respectively are interested, and the true intent and meaning of them and of these presents are, and these presents are upon this express condition, that if the said R. J. his heirs, executors, administrators, or assigns, do and shall well and truly pay, or cause to be paid, unto the said S. R. his executors, administrators, or assigns, the full sum of three thousand pounds, of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, at or in the common dining hall of the Inner Temple, London, upon the day of which will be in the year of our Lord 1816, and in the mean time do and shall half yearly (that is to say) on the day of and the day of during the continuance of the said sum of three thousand pounds on this security, well and truly pay or cause to be paid to the said S. R. his executors, administrators, or assigns, at or in the same place, interest for the said sum of three thousand pounds, at and after the rate of five pounds for one hundred pounds for a year; and if the said R. J. his heirs, executors, administrators, or assigns, do and shall pay the said principal sum of three thousand pounds, and the interest thereof, without any deduction or abatement whatsoever, out of the same principal money and interest, or any part thereof, for and in respect of any

taxes, charges, rates, assessments, payments, or impositions, at any time or times heretofore, and to be at any time and from time to time hereafter taxed, charged, assessed, or imposed on the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or upon the said sum of three thousand pounds, and interest, or any part thereof, or upon the said S. R. his executors, administrators, or assigns, or any other person or persons whomsoever, on account or in respect of the said sum of three thousand pounds, or the interest thereof or any part of the same respectively, or upon account or in respect of the said messuage, farm, lands, and hereditaments hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any of them, or any part of the same, by authority of parliament or otherwise howsoever, or upon account or in respect of any other matter, cause, or thing, whatsoever, other than and except the present or any future tax on property or income, then and in that case immediately after such payment shall be made as aforesaid, the said term of two hundred years, and also one bond or writing obligatory, bearing even date with these presents, given and entered into by the said R. J. to the said S. R. in the sum of six thousand pounds, and conditioned to be void on payment of the sum of three thousand pounds and interest for that sum, the said bond and these presents being given for securing one and the same sum of three thousand pounds and its interest, and not divers sums and their interest, shall cease and be void to all intents and purposes whatsoever, any thing hereinbefore or in the said bond contained to the contrary in anywise notwithstanding. *And* the said B. C. W.

for himself, his heirs, executors, and administrators, doth by these presents covenant and declare to and with the said S. R. his executors, administrators, and assigns, that he the said B. C. W. hath not at any time or times heretofore made, done, executed, or committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, or any part thereof, are, is, can, shall, or may be impeached, charged, incumbered, or in anywise affected in title, charge, estate, or otherwise howsoever. And the said R. J. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said S. R. his executors, administrators, and assigns, that he the said R. J. his heirs, executors, administrators, and assigns, or some or one of them, shall or will well and truly pay, or cause to be paid, unto the said S. R. his executors, administrators, or assigns, the said principal sum of three thousand pounds, and the interest thereof, at the rate aforesaid, at the time and place hereinbefore appointed for payment thereof, without any deduction or abatement, on any account whatsoever, except as aforesaid, and according to the true intent and meaning of these presents. *And* also that the said R. J. and B. C. W. now have in themselves, respectively good right, or full power and lawful and absolute authority by these presents to bargain, sell, demise, and confirm the said messuage, farm, lands, and hereditaments hereby bargained, sold, and demised, or otherwise assured, or intended so to

be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said S. R. his executors, administrators, and assigns, for and during the said term or time of two hundred years, according to the true intent and meaning of these presents. AND ALSO that immediately after default shall be made in payment of all or any part of the said sum of three thousand pounds and interest, contrary to the true intent and meaning of these presents, and the proviso or agreement for redemption hereinbefore contained, and thenceforth from time to time during the residue of the said term of two hundred years, it shall and may be lawful to and for the said S. R. his executors, administrators, and assigns, to enter into and upon, and have, hold, use, occupy, possess, and enjoy the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part and parcel of the same, according to the true intent and meaning of these presents, without any lawful let, suit, trouble, eviction, ejection, expulsion, interruption, or denial whatsoever, of, from, or by them, the said R. J. or B. C. W. or either of them, or any other person or persons whomsoever, (other than and except the person or persons whose estate or interest, or several estates or interests is or are hereinafter excepted, for or in respect, and only for or in respect of the same estate or interest, or several estates or interests) and free and clear, and

freely, clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by him: the said R. J. his heirs, executors, or administrators, at his or their own costs and charges, in all things well and sufficiently protected, defended, saved harmless and kept indemnified, of, from, and against all and all manner of former and other gifts, grants, feoffments, mortgages, leases, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, intails, annuities, legacies, rents charges, rents seck, rents service, and all arrears of rent, and also of, from, and against all and all manner of fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the king's majesty, or any of his predecessors, sequestrations, estates, titles, troubles, liens, charges, and incumbrances whatsoever at any time or times heretofore, and to be at any time and from time to time hereafter had, made, done, committed, occasioned, permitted or suffered by the said R. J. or any other person or persons whomsoever, the land tax charged or chargeable upon, and which henceforth shall become payable for the same messuage, farm, lands, and hereditaments, or any of them, and a rent-charge of four hundred pounds payable to Johanna J. widow for her life out of the same messuage, farm, lands, and hereditaments, and other hereditaments, and the term, estate, or interest, of the said J. J. always excepted; AND FURTHER, that the other hereditaments, which are charged or chargeable with or liable to the payment of the said annuity, or yearly rent charge of four hundred pounds, shall exclusively of and by way of indem-

nity to the messuage, farm, lands, and hereditament, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, be the fund for answering and paying the same annuity or yearly rent charge. ~~AND MOREOVER~~ that he the said R. J. and his heirs, and all persons whosoever lawfully or equitably and rightfully claiming, or to claim any estate right, title, trust, charge, or interest at law or in equity, of, in, to, out of or upon the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, ~~of~~ any of them, or any part thereof, (other than and except the person or persons whose estate or interest or several estates or interests is or are hereinbefore excepted, for or in respect of the same estate and interest, or several estates or interests,) shall and will from time to time, and at all times, upon every reasonable request of the said S. R. his executors, administrators, and assigns, and at the costs and charges in all things of the said R. J. his heirs, executors, administrators, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, for further, better, more perfectly, lawfully, and absolutely or satisfactorily bargaining, selling, demising, confirming, or otherwise assuring the said messuage, farm, lands, and hereditaments, hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their

rights, members, and appurtenances, unto the said S. R. his executors, administrators, and assigns, for and during the residue of the time of the said term of two hundred years, according to the true intent and meaning of these presents, as by the said S. R. his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required; AND it is hereby declared and agreed by and between the said R. J. and S. R. and the said R. J. doth hereby consent and agree that in the mean time, and until default shall be made in payment of all or some part of the said sum of three thousand pounds, and the interest thereof, contrary to the true intent and meaning of these presents, and the proviso or agreement for redemption hereinbefore contained, it shall or may be lawful to and for the said R. J. his heirs or assigns, or the said B. C. W. his executors, administrators, or assigns, as such trustee or trustees, to hold, occupy, enjoy, and receive and take the rents and profits of the said messuage, farm, lands, and hereditaments hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with the rights, members, and appurtenances, without any let, suit, or interruption whatsoever, of, from, or by the said S. R. his executors, administrators, or assigns, or of, from, or by any person or persons, rightfully claiming, or to claim, by, from, under, or in trust for him or them, any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

FORM VII.

*Confirmation of a Lease to the Assignee thereof, and
Defeazance reviving Condition.*

THIS INDENTURE, made the said day of between A. B. of, &c. of the one part, and the bailiffs, burgesses, and commonalty of the town or borough of L. in the county of S. of the other part. WHEREAS by indenture bearing date on or about the 27th day of October, in the year 1781, and made between the said bailiffs, burgesses, and commonalty, of the one part, and S. D. of, &c. of the other part, all that messuage, &c. with the appurtenances were demised, by the said bailiffs, burgesses, and commonalty, unto the said S. D. his executors, administrators, and assigns, to hold from the day of the date of the said indenture, for a term of thirty-one years, thence next ensuing, at a yearly rent, by the same indenture reserved, and subject to several covenants and conditions therein contained, such conditions being to the same effect as the conditions contained in the defeazance* hereinafter in-

* The assignment should precede the defeazance.

serted; AND WHEREAS the said S. D. *hath assigned* the messuage, or tenement and premises, unto the said A. B. his executors, administrators, and assigns, for the residue of the said term of thirty-one years; AND WHEREAS such assignment was made with the approbation of the said bailiffs, burgesses, and commonalty, upon the terms that the said A. B. should execute the defeazance hereinafter contained; and in consideration thereof the said bailiffs, burgesses, and commonalty, agreed to confirm unto the said A. B. the said lease, and the term thereby granted: NOW THIS INDENTURE WITNESSETH that in consideration of the premises, the said bailiffs, burgesses, and commonalty, *do* by these presents ratify and confirm unto the said A. B. his executors, administrators, and assigns, the said in part recited indenture of lease, and the messuage, or tenement and premises thereby demised as aforesaid, or intended so to be, with the appurtenances, and all the term, estate and interest therein which was granted as aforesaid, subject nevertheless to the reservation, covenants, conditions, and agreements, in the said indenture of lease contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed, performed, fulfilled and kept; AND THIS INDENTURE FURTHER WITNESSETH that in pursuance and performance of the said agreement, on the part of the said A. B. and in consideration of the premises, it is hereby declared by and between the parties to these presents, and the said A. B. doth by these presents, for himself, his executors and administrators, *grant unto* the said bailiffs, burgesses, and commonalty, their successors and

assigns, that, &c. (*here repeat the condition*) then &c. (*here take the conclusion of the condition.*) And the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said bailiffs, burghesses, and commonalty, and their successors and assigns, that he the said A. B. his heirs, executors, or administrators, shall and will, from time to time, and at all times hereafter, during the residue of the said term of thirty-one years, or which shall first happen, until he or they shall have assigned the said demised premises, with such licence and consent as aforesaid, well and truly pay, or cause to be paid, unto the said bailiffs, &c. and their successors, for the time being, the said yearly rent, by the said recited indenture reserved and made due and payable, on the days and times thereby appointed for payment thereof, and perform, fulfil, and keep all and singular the covenants, clauses, and agreements, in the same indenture contained, and which on the tenant or lessee's part and behalf are, or ought to be paid, done, and performed, any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

The form of a demise, to protect against *forfeiture*,* may, *mutatis mutandis*, be adapted to the case of a lease preparatory to a *fine*.

The forms of farming and other leases will be found in the book of precedents, except that the substance of the covenants should be governed by the usage.

* See Vol. I. p. 468, 472.

FORM VIII.

Lease, or Bargain and Sale for a Year.

THIS INDENTURE, made the day
of in the 55th Geo. III. &c. and in the
year of our Lord 1815, between W. B. of Lincoln's
Inn, in the county of Middlesex, Esquire, of the
one part; and W. L. of the honourable society of
Lincoln's Inn, Esquire, of the other part; WIT-
NESSETH, that in consideration of five shillings, of
lawful money, current in Great Britain, paid to the
said W. B. by the said W. L. the receipt whereof is
hereby acknowledged, the said W. B. hath bargain-
ed and sold, and by these presents doth bargain-
and sell, unto the said W. L. his executors, admini-
strators, and assigns, ALL those chambers, &c. and
all rooms, &c. (*parcels and general words, as in the
release;*) TO HAVE AND TO HOLD the said cham-
bers, hereditaments, and all and singular other the
premises hereby bargained and sold, or intended
so to be, with the appurtenances, unto the said
W. L. his executors, administrators, and as-
signs, from the day next before the day of the
date of these presents, for the term or time of one
whole year thence next ensuing, and fully to be
complete and ended, yielding and paying there-
fore unto the said W. B. his heirs or assigns, the
rent of one pepper corn, on the last day of the

FORM IX.

Feoffment with Covenant to levy a Fine, and Letter of Attorney to receive, and Letter of Attorney to give Livery.

THIS INDENTURE, of five parts; &c. made, BETWEEN J. L. of, &c. and Sarah his wife, of the first part; G. S. of, &c. and Frances his wife, of the second part; T. L. of, &c. of the third part; the Rev. J. F. of, &c. and B. W. of, &c. of the fourth part; and J. A. of, &c. and W. W. of, &c. of the fifth part. WHEREAS the said J. L. is seised to him and his heirs, in fee-simple (subject to the title of dower of the said Sarah his wife,) of five-eighth parts of the manor, messuages, lands, and hereditaments, hereinafter described, and also enfeoffed, or otherwise assured, or intended so to be; and the said G. S. is seised to him and his heirs, in fee-simple (subject to the title of dower of the said Frances his wife,) of the remaining three-eighth of the same manor, messuages, lands, and hereditaments. AND WHEREAS the said manor, messuages, lands, and hereditaments, have been lately sold in lots, to several persons; and for the purpose of bringing the evidence of title to the same manor and hereditaments into a narrow.

compass, and for extinguishing all dower, right and title of dower of the said Sarah L. and Frances L. it hath been advised, determined, and agreed that a feoffment should be made, and a fine levied, of the same manor and hereditaments. Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of ten shillings of lawful money, current in Great Britain, to each of them the said J. L. and Sarah his wife, G. L. and Frances his wife, well and truly paid by the said T. L. immediately before the execution of these presents, the receipt whereof is hereby acknowledged, they the said J. L. and Sarah his wife, G. S. and Frances his wife, according to their respective shares, estates and interests in the said manor and hereditaments, HAVE, and each and every of them, hath given, granted, and enfeoffed, and by these presents, Do and each and every of them, BOTH give, grant, and enfeoff, unto the said T. L. his heirs and assigns for ever, all, &c. (*parcels and general words*) and the reversion, &c. and all the estate; To HAVE AND TO HOLD the said manor, messuages, lands, hereditaments, and all and singular other the premises hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said T. L. his heirs and assigns for ever, to the use of the said T. L. his heirs and assigns for ever, upon the trusts hereinafter expressed and declared, of and concerning the same, (that is to say) as, to, for, and concerning those five undivided eighth parts thereof, now or late of the said J. L. (the whole in eight equal parts or

shares to be divided,) in trust for the said J. L. his heirs and assigns for ever, and as, to, for, and concerning the remaining three undivided eighth parts thereof, (the whole in eight equal parts to be divided,) in trust for the said G. S. his heirs and assigns for ever; AND the said J. L. doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the five-eighth parts of the said J. L. of and in the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself and his said wife, relating thereto, and the said G. S. doth hereby for himself, his heirs, executors, and administrators, and as far as relates to and concerns the said three-eighth parts of the said G. S. of and in the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and the acts, deeds, and defaults of himself, and his said wife, relating thereto, covenant and agree with the said his heirs and assigns, in manner following, that is to say, that they the said J. L. and Sarah his wife, and G. S. and Frances his wife, shall and will, at the proper costs and charges of the said J. L. and G. S. in or as of term now last past, or before the end of term now next ensuing, or in or as of some other subsequent term, acknowledge and levy unto the said T. L. and his heirs, before his Majesty's Justices of the court of Common Pleas, at Westminster, one or more fine or fines *sur conuzance de droit come ceo*, &c. with proclamations to be thereupon had and made according to the form of the statutes in that case made and

provided, and the usual course of fines in such cases used of the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, with the rights, royalties, members, and appurtenances, by the names and descriptions of

or, by such other apt and convenient names, number of messuages, and acres, quantities, qualities, and other descriptions, to comprise the same, as by the said T. L. his heirs or assigns, or his or their counsel in the law shall be reasonably advised, or devised and required. AND it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested in the premises, and they hereby severally and respectively direct and appoint, that the fine or fines to be so as aforesaid, or in any other manner or at any other time or times acknowledged and levied, and also all and every fine and fines, common recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter acknowledged, levied, suffered, made, and executed of the said manor, messuages, lands, and hereditaments hereby granted and enfeoffed, or otherwise assured or intended so to be, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever, by or between the said parties to these presents, or any of them, either alone or jointly and together with any other per-

son or persons whomsoever, or to which they or any or either of them is or are, or shall or may be parties or privies, or a party or privy, shall be and enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant and intended, and is and are hereby directed and declared to be and enure. AND that the person or persons to whom the said fine or fines, and other assurances respectively have or hath been, and shall or may be levied, suffered, made, and executed, shall stand and be seised, as to, for, and concerning the said manor, messuages, lands, and hereditaments, hereby granted and enfeoffed, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, hereinbefore limited, expressed, declared, and contained, of and concerning the same, in confirmation of these presents, and for giving more full and complete effect to the same. AND the said J. L. and Sarah his wife, and G. S. and Frances his wife, have, and each and every of them hath nominated, constituted, and appointed, and by these presents *do*, and each and every of them *doth* nominate, constitute, and appoint the said to be their and each of their lawful attorney, for them, and each, any, or either of them, and in their and each or any of their names respectively, to enter into and take full, quiet, and peaceable possession and seisin of all and singular the aforesaid manor, messuages, lands, and hereditaments, or some part thereof in the name of all the same manor and hereditaments, and

then to deliver full, peaceable, and quiet possession and seisin thereof in the name of the whole, to the said T. L. or to his attorney or attornies lawfully authorized, according to the form, effect, true intent and meaning of these presents. AND the said T. L. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint, the said his true and lawful attorney for him and in his name and stead to receive and take of and from the said J. L. and Sarah his wife, G. S. and Frances his wife, or any or either of them, either in person or by his or their attorney or attornies lawfully authorized in that behalf, possession and seisin of all and singular the said premises, or of some part thereof in the name of all the same manor and hereditaments, and such possession and seisin so taken thereof, To HOLD and to keep to the use of the said T. L. his heirs and assigns according to the effect, true intent and meaning of these presents. IN WITNESS, &c.

FORM VI.

*Form of Grant of several 'attendant Terms by
Way of Underlease.*

AND IT IS ALSO WITNESSED, that in further pursuance of the said resolutions, and for carrying the same into effect, and in consideration of ten shillings to each of them the said several parties hereto of the second and third parts paid by the said R. C. and E. J. they the said several persons parties hereto of the second and third parts, according to their several and respective estates, rights, and interests, and at such request, and with such privity, consent, and approbation, and testified as aforesaid, *do*, and each and every of them *doth* demise, lease, set, and to farm let unto the said R. C. and E. J. their executors, administrators and assigns; All such, and so many, and such parts of *all* and singular the castle, manors, or lordships, or reputed manors or lordships, messuages, farms, lands, and hereditaments, whatsoever, comprised in the said indentures of lease and release, and bargain and sale, and each or either of them, as are now vested in the said several persons parties hereto of the second and third parts respectively, 'or any of them, for any term or terms of years in mortgage, for securing

any gross sum or sums of money and interest owing to them, or to those for whom they are trustees, or for any term or terms for years, for securing any annuities to them respectively, or to those for whom they are trustees, with their and every of their rights, royalties, members, and appurtenances ; To HOLD the same castle, manors, and other hereditaments, with their appurtenances, unto the said R. C. and E. J. their executors, administrators, and assigns henceforth for and during the term or several terms for years which each of the said persons respectively parties hereto of the second and third parts hath in the same castle, manors, and hereditaments respectively, except the last day of each of the same terms (being an exception made to the intent and for the purpose of preventing the merger of any of the same terms) NEVERTHELESS UPON TRUST for such person and persons, and to and for such ends, intents, and purposes, and to be from time to time assigned and disposed of in such manner and form in all respects as the said L. S. and L. S. the younger, or the survivor of them, his heirs or assigns, or the trustee or trustees who from time to time shall be substituted in his or their place or stead shall direct and appoint, and that the said L. S. and L. S. the younger, and the survivor of them, his heirs or assigns shall from time to time, and at all times during the continuance of the same several and respective terms, and in the mean time, and until such assignment or assignments shall be made, be interested in and have the direction of the same terms respectively, upon, under, and subject to the same or the like trusts, and for the same or the like ends, intents,

and purposes, in all respects as are hereinbefore expressed and declared concerning the inheritance of the said hereditaments and premises, or as near thereto as may be, and the circumstances of the case and the nature of the tenure or estate, and the rights of the persons beneficially interested will admit ; and (subject thereto) UPON THIS FURTHER TRUST that the said R. C. and E. J. and the survivor of them, his executors, administrators, and assigns, *do* and shall assign the said castle, manors, hereditaments, and premises, for all the then residue of the several and respective terms hereby demised therein, unto such person and persons, and for such ends, intents, and purposes, as the said C. Lord C. and J. E. A. or the survivor of them, his heirs or assigns, or the trustee or trustees for the time being, of the said recited indentures of release and bargain and sale shall direct or appoint. There followed,

A covenant from each of them the said several parties thereto of the second and third parts severally, separately, and apart from the others of them that he had not done any act to incumber.

AN

ANALYTICAL DIGEST,

BY WAY OF

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WIFE. See *Feme Covert*.

THE END OF THE SECOND VOLUME.

The Reader is requested to make the following Corrections.

Page 26, for Dowmans, read Downmans.

29, for Usunum, read Usuum.

93, for Komys, read Kemys.

143, line 16, for to, read by.

156, for conveyance to uses, read uses in conveyances.

203, line 22, for material, read important.

225, for demurs, read demises.

257, for sound, read found.

260, for their claim, read the claim of the crown.

260, for Peck, read Perk.

261, for call, read case.

265, for Mathell read Machell.

268, for metter, read matter.

274, for suppose, read support.

282, for Lampells, read Lampetts.

342, for B. read C.

43, for C. read D.

72, for bains, read bonis.

73, for Herlet read Hestic.

81, for call, read roll.

Page 142, line 3, after by, add A.

154, line 16, after lives, add not in esse.

183, after or, add if he shall die after that age.

192, after purchaser, add when ascertained.

192, after settled that, add a condition in.

203, line 3, after B. add and also mortgages made by a limitation of use, as a conveyance to uses.

220, after could not, add within a convenient time.

251, line 6, after and, add for this purpose.

295, after effected conveyance, add for a time.

Page 167, omit partially.

233, omit on this point and also.

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